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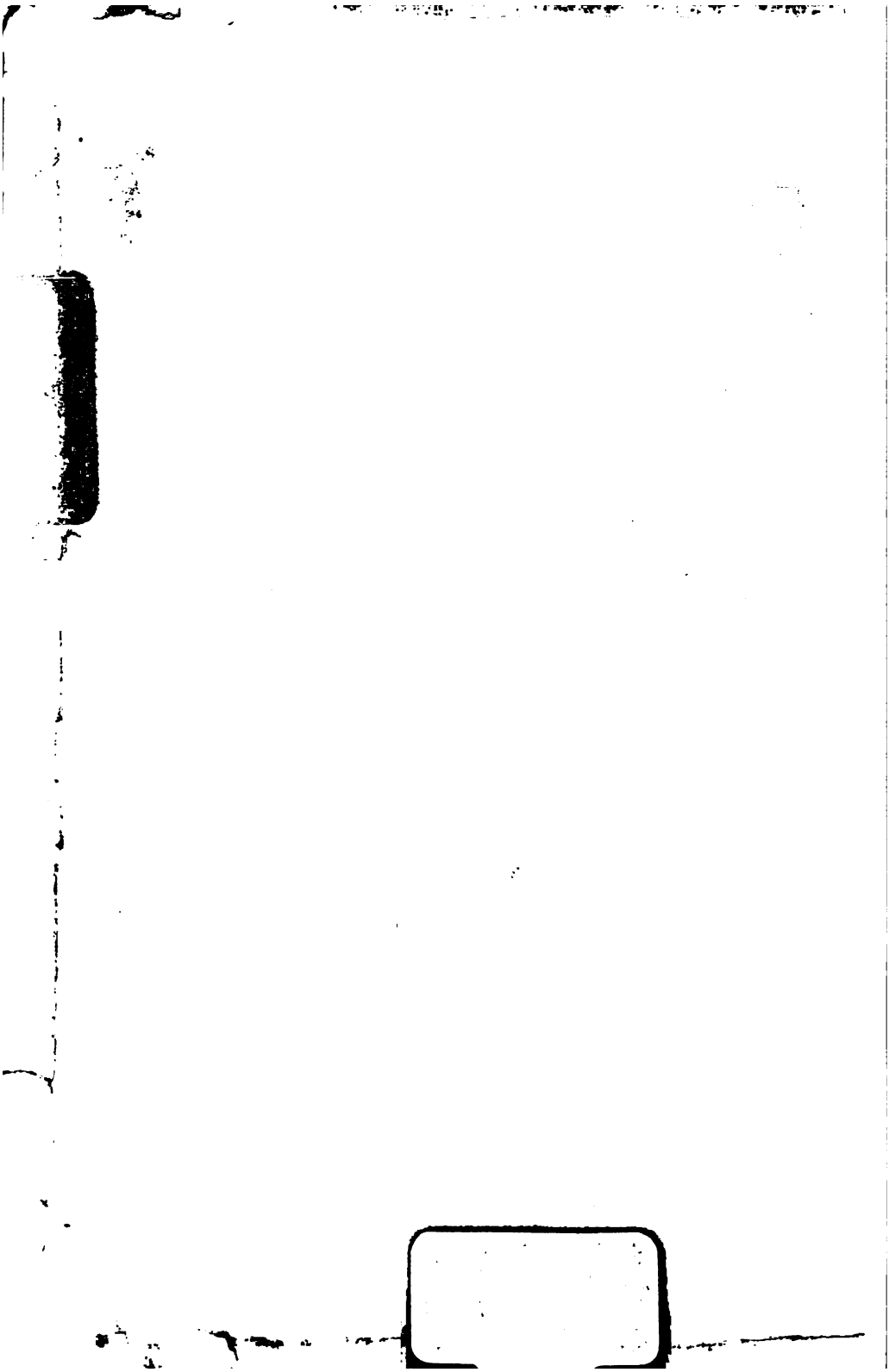

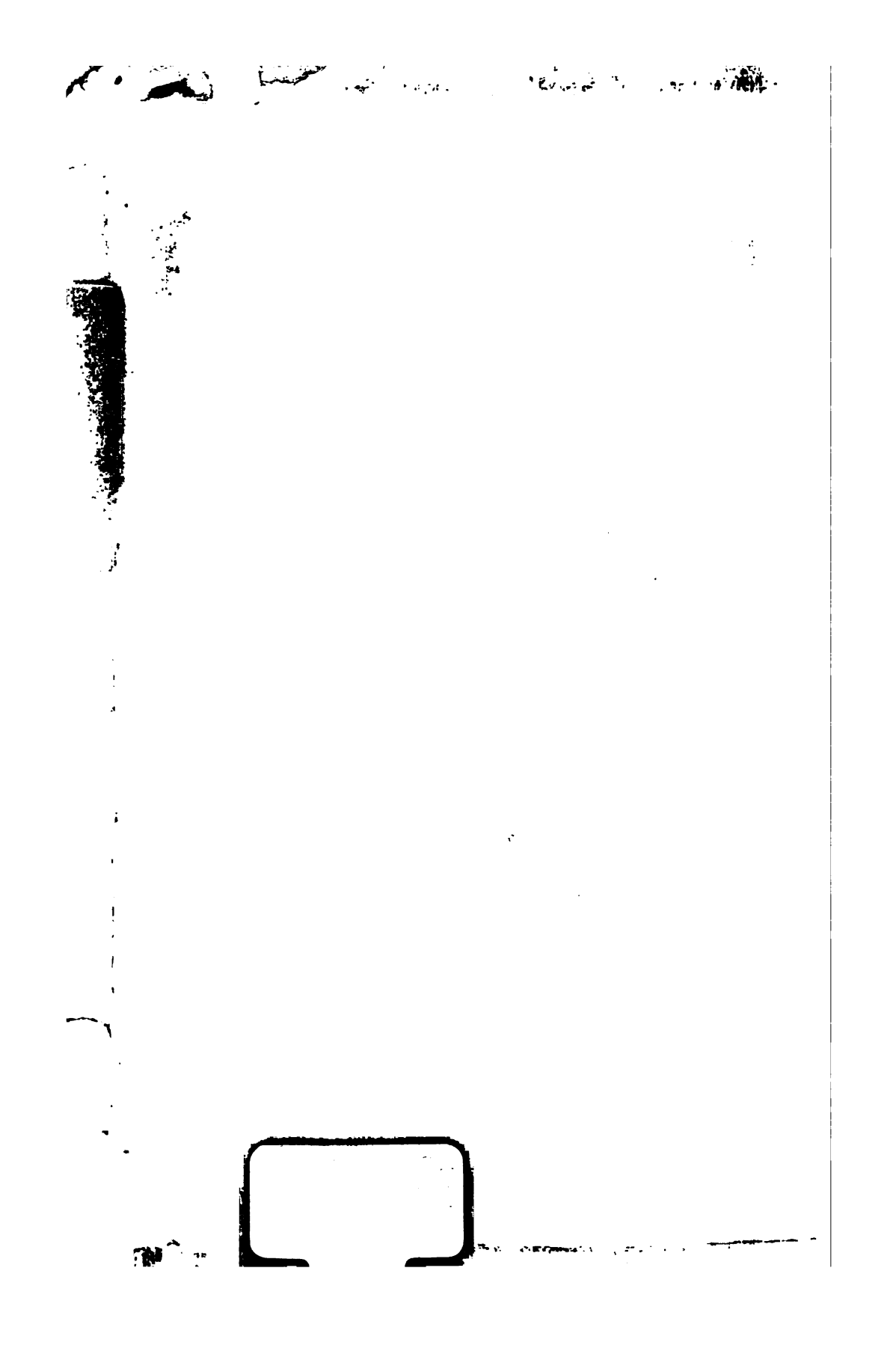

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PREFACE.

The doctrines of equity jurisprudence seek to relieve the rigor of the principles enforced by courts of law. The distinction between such principles and those adopted by chancery courts is still recognized, even in those states where courts of law and equity have consolidated and where a litigant may, regardless of the form of action he brings, obtain a remedy either at law or in equity.

Professor John N. Pomeroy, University of Illinois, is the author of the commentary on "Equity" in this volume. He traces the history of the contest between law and equity and discusses thoroughly the present powers of the long arm of chancery courts.

Following in appropriate order is the work of Professor George G. Bogert, Cornell University, on the "Law of Trusts." This subject, which rests on equitable doctrines, is of especial practical importance to property interests.

Professor A. M. Cathcart, Leland Stanford Junior University, is the author of the next treatise which discusses "Quasi-Contracts." The law of quasi-contracts forms an interesting link between the principles of law and those of equity.

Mr. Oliver S. Rundell of the Wisconsin Bar is the author of the commentary on the "Law of Estoppel," the last subject treated in this volume. The doctrines of estoppel, aside from their practical significance, are important and interesting because of their application to the rules of both law and equity.

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EQUITY

BY

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INTRODUCTION

CHAPTER I.

ORIGIN AND NATURE OF EQUITY.

1. **Definition of equity.**—Equity is the system of law that was administered by the English Court of Chancery, and was adopted and is administered by courts of the same name or possessing the same functions in this country and in the English colonies. Courts of chancery were radically different from courts of common law in their procedure; the most striking difference being that issues of fact, in the former, were usually tried without a jury. The system of rules of substantive law developed by these courts was also very different. Most distinctive of this system is the great variety and efficiency of its remedies, in contrast with the three remedies of the modern common law, viz., the recovery of the possession of land or chattels or the judgment for a sum of money. Al-

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most as great a contrast was presented, until fairly recent times, by the just and enlightened character of equitable principles, compared with the harshness and arbitrariness of much of the early common law. This latter contrast has, of course, in large measure disappeared. Much of the progress in legal reform which marked the nineteenth century consisted in the adoption of equitable principles by courts of law. It still remains true, however, that in the study of equity one constantly feels the presence of high ethical standards; whether the same statement can be made, with equal emphasis, of all branches of the common law, is a matter on which opinions may well differ.

2. **Why a court of chancery was needed.**—The legal history of English speaking countries, then, exhibited for centuries the curious spectacle of two sets of courts, dealing largely with the same subjects, but administering systems of law utterly different in their whole character and atmosphere; one system, for centuries, having next to no influence or effect upon the other; and all this, with remarkably little confusion or clashing of authority. For the explanation of this anomalous state of things we must search in the history of English institutions in the later mediaeval and early modern centuries. Running back, then, some six centuries or more, we find the three superior law courts building up the common law, reducing it to the form of written precedents through recorded decisions. A distinguishing feature of this system was the enormous respect paid to precedent, and the unwillingness of

the judges to change or adapt a rule, once established by precedent, to meet the needs of an advancing civilization. The system, like most early legal systems, was marked by an exaggerated formalism. Under the method of procedure by "writs," a suitor's cause of action must fall within one of a limited number of settled forms or precedents, or else he could have no relief. Thus, at this period there was no such thing as enforcing a contract not under seal, unless it created a certain debt. Such actions as case, trover, and assumpsit had not yet been invented.[1]

3. **The chancellor—Origin and rise of equity jurisdiction.**—Suitors who could find no remedy in the common law courts might, as a last resort, petition the king or his privy council. At some undetermined date—certainly before the year 1300—it became common to refer such petitions to the chancellor. This was the most important officer of the crown, whose duties were very numerous. Probably at this time, at any rate at a not much later period, he exercised a certain amount of jurisdiction as an ordinary common law judge. The petitions referred to him by the crown came to be known as his extraordinary jurisdiction; such cases were to be decided on principles of honesty, equity, and conscience. Before the year 1400 the court of chancery was in full operation; though its jurisdiction and rules of decision for some time continued to be somewhat undefined. Long before the Reformation, however, we find established and in constant use

[1] Pomeroy, Equity Jurisprudence, §§ 16-29.

many of the rights and remedies of equity which are familiar to us to-day; such as the injunction, and uses, the precursor of what are now called trusts. The sixteenth and seventeenth centuries were great periods in its growth; a large proportion of the present doctrines of equity find their origin before the year 1700.[2]

4. **Modern consolidation of law and equity courts.** —The court of chancery, as a distinct tribunal with separate judges, was abolished in England by the great reform known as the Judicature Acts of 1873. By this reform equitable and legal rights and remedies are administered in the same case; the rules of equity being given a preference where they are in conflict with rules of law. Substantially the same reform was inaugurated in this country twenty-five years earlier, in the state of New York; and within a few years spread over more than half the states. These are known as the code states, from the fact that the main principles of their procedure are embodied in a code, modelled upon that of New York. These states comprise New York and Connecticut in the east; all the states of the middle and far west except Illinois and Michigan; and four southern states—North and South Carolina, Kentucky and Arkansas. In nearly all the other states and in the federal courts, suits in law and in equity are distinct, with different procedure, but the same court hears both classes of suits, sitting part of the time as a law court, part of the time as a court of equity. A few states—New Jersey, Delaware, Ala-

[2] Pomeroy, Equity Jurisprudence, §§ 30-39.

bama, Mississippi, Tennessee—preserve separate courts of chancery. In all states the principles and remedies of equity remain, in theory at least, undisturbed by this consolidation of courts or by changes in procedure.

5. **Nature of equity.**—There is more or less of a popular notion that everything in equity is vague and undefined, not susceptible of being reduced to exact rules; that an equity judge administers justice according to his individual notions of what is right, without much guidance from precedents. A great English lawyer, some three centuries ago, uttered this oft-quoted sarcasm: "Equity is a roguish thing. For law we have a measure and know what we trust to. Equity is according to the conscience of him that is chancellor: and as that is larger or narrower, so is equity. 'T is all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the chancellor's conscience."[3] Now this description, very likely, would have been true to the facts if made a century or two earlier. Cases referred to the chancellor were, as indicated, directed to be decided according to principles of honesty, equity, and conscience. In following this general direction, the decisions of the earliest chancellors were necessarily innovations, by way of supplying defects in the common law, or correcting the harshness of some of its rules. Undoubtedly, there

[3] Selden's Table Talk, title, Equity.

was much fluctuation in the rulings of successive chancellors in the early centuries, before the Reformation; but as their decisions, in the sixteenth and seventeenth centuries, came to be more frequently reported, a body of precedents was accumulated which furnished the basis for future decisions. It is true that many leading rules in equity originated in the seventeenth and eighteenth centuries; but the same is true in many parts of the common law. Equity, to-day, is as much a system of rules and principles as is any great division of the law.

6. **Same subject.**—There is, however, an element of truth in the popular conception of equity alluded to in the last paragraph. There is some degree of vagueness about many of the principles of equity, and undoubtedly always will be, as long as the system lasts. Far from being a defect, it is a distinguishing merit of the system. The rules of the common law, being laid down in large part for the guidance of the jury, must necessarily be precise and definite. Principles of equity, on the other hand, are applied by trained judges to sets of facts which are usually much more complicated than the issues presented to a jury. An experienced equity judge may be trusted to apply an abstract principle, expressed in very general terms, which a jury would find meaningless or bewildering. Consequently, we find that many equitable remedies and defenses are said to lie "in the discretion of the court." In exercising such discretion the judge will derive much aid from precedents, to be sure; but much more from correct understanding of the general principle

itself, as interpreted by an enlightened sense of justice. Again, equitable principles, because of this same generality or vagueness; and equitable remedies, because of their flexibility, or the power of the court to mould them to suit the circumstances of the case; are capable of indefinite expansion and growth. Equity judges, to-day, do not invent new principles; but the process of applying old principles to entirely new emergencies goes steadily on. The growth of some departments of American equity in the last thirty or forty years has been truly astonishing: the law of receivership, for example, which requires volumes for its adequate treatment, is almost entirely the work of a single generation of judges. This infinite capacity for development and growth gives to the study of equity a peculiar fascination. No other department of the law is so full of the modern spirit.

7. **Classification of the subject.**—Writers are not agreed as to the best classification of the mass of rules that make this subject. One method is to separate it into two divisions, the exclusive jurisdiction, and the concurrent jurisdiction. A serious objection to this method is that there is no agreement as to the sense in which these terms should be used. By one definition, if the same set of facts give rise to two remedies, one at law and one in equity, the equitable remedy belongs to the concurrent jurisdiction. Thus, since fraud often gives rise to a remedy at law for damages, or to rescission of the fraudulent transaction and cancellation (i. e., destruction) of the instrument in which it is embodied as the equita-

ble remedy, cancellation would belong to the concurrent jurisdiction. A better definition of the concurrent jurisdiction compares the character of the two remedies—the legal and equitable—arising from the same facts, and if there is a general similarity in their nature, classes the equitable remedy in the concurrent jurisdiction. Thus, the remedy of replevin lies at law for the recovery of a chattel wrongfully detained from the owner; equity also sometimes (though rarely) under the same circumstances, enforces the delivery of a chattel.[4] Under this definition of the concurrent jurisdiction, however, the remedies comprised within it are comparatively few.[5] A more convenient division, for the purposes of this article, is that into equitable remedies; equitable property rights, or quasi-property rights;[6] and the general principles, doctrines, and maxims which run through the whole system. This classification has the advantage, for the reader, of starting with the concrete, and working gradually toward the abstract.

8. **Equitable remedies.**—Legal remedies are, practically, only two in number: the recovery of possession of land (ejectment) or chattels (replevin), and the recovery of a sum of money as an ascertained debt or as damages. The remedies of equity in common, every day use, on the other hand, number at least two dozen; and in theory this number is without limit. The power is asserted and is constantly exercised to mould or adjust its ordinary remedies to suit the circumstances of the individual

[4] See § 14.

[5] See an enumeration in Pomeroy, Equity Jurisprudence (3d ed.), §§ 173-189.

[6] See § 118.

case. This result naturally flows from the freedom and flexibility of the rules of equity procedure relating to parties and judgments, as compared with the common law rules. By the equity practice, all parties who are interested in the subject matter of the suit, so that their rights may be affected by the decree, are made parties, either as plaintiffs or defendants, and the relief given to each party is adjusted to his rights.

9. **Equity acts in personam.**—Perhaps the most distinctive feature of equitable remedies is that they usually act in personam—against the person. This does not mean, at all, that equity deals chiefly with personal rights and duties; on the contrary, its jurisdiction is concerned almost exclusively with rights of property. The meaning is, that the order or decree of the court is addressed to the party, directing him to do some specified act; his disobedience will be treated as a contempt of court, and punished by fine or imprisonment. Thus, if the suit results in the establishment of A's right in equity to a conveyance of certain land from B, the latter is ordered to make a deed in proper form, sufficient to convey the land to A. The decree did not operate of its own force to vest the legal title in A.[7] Courts of equity, in their early history, were hardly in a position to dictate to courts of law what the latter should recognize as constituting a legal title. They accomplished the desired result by compulsion upon the person of the defendant, ordering him to make such title as the

[7] Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 1 Ames, Equity Jurisdiction Cases, p. 11.

courts of law would recognize. Again, suppose that B has obtained a judgment at law against A by methods which a court of equity deems unconscientious or fraudulent. Chancery did not assume to reverse this judgment; it did, however, by its decree, order B to take no steps to realize the benefit of his judgment.[8]

One important result of this personal element in the equity decree is that the court may order a party to do an act which will take effect in a foreign state or country. Thus, suppose that B is under some equitable duty to convey certain land in Indiana, or in Canada, to A. If a court of equity in Illinois has jurisdiction over the person of B, A may obtain a decree in Illinois directing B to execute a deed, in proper form, of the land in Indiana or Canada; and B's deed, so executed, will be recognized by the foreign court as fully as if it were B's voluntary act.[9]

10. **Same subject—Statutory changes.**—The rule that equity acts only in personam was subject to some inconveniences. An obstinate defendant had it in his power to set the decree at defiance, if he preferred to stand the consequences of his contempt; while an insane or incompetent defendant could not make a valid conveyance, whether under compulsion or not. For these and other reasons, statutes have been passed in all the states, enabling many decrees

[8] See § 64.

[9] Penn v. Lord Baltimore, 1 Ves. Jr. 444 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 12, 1 Scott, Cases on Equity, p. 236; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192, 1 Ames, Equity Jurisdiction Cases, p. 6, LEADING ILLUSTRATIVE CASES.

to be carried out without the coöperation of the persons against whom they are made. If the purpose of the decree is to vest B's title in A, some court officer is empowered by the statute to execute the proper instrument, which will then have the same effect as if it had been made by B: or, by some statutes, the decree itself is given the force of a conveyance by B to A. An important result of these statutes is, that a court of equity is often able to settle the title to land within its territorial jurisdiction although B, the party who would otherwise have to execute a deed, is not personally before the court and cannot be reached by its process.[10] In perhaps a majority of cases, however, the decree of a court of equity is necessarily in personam: as in injunction, the commonest of equitable remedies.

[10] Dillon v. Heller, 39 Kan. 599, 18 Pac. 693, 1 Ames, Equity Jurisdiction Cases, p. 14, 1 Scott, Cases on Equity, p. 246, LEADING ILLUSTRATIVE CASES; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557.

PART I

EQUITABLE REMEDIES

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS.

11. **Specific performance defined.**—Specific performance of contracts is the remedy by which the parties to a contract are compelled to do the very acts which the contract calls for.[11] By means of its machinery for enforcing its decrees—imprisonment and the like[12]—the court of equity has the power, in many instances, to compel the literal performance of the terms of a contract, while a court of law, as a general thing, can only award damages for breach of the contract.

It happens that this remedy of specific performance illustrates admirably a great many of the general principles and doctrines peculiar to equity; it furnishes, therefore, an excellent introduction to the study of the subject—a sort of cross-section.

12. **Adequacy of remedy at law.**—Courts of equity came into existence not to displace the work of the law courts but to supplement its defects. It is a fundamental principle of equity jurisdiction,

[11] For example, if defendant has contracted to convey a certain piece of land, the court orders him to execute a deed in proper form sufficient to convey the land.

[12] See § 9.

therefore, that a court of equity will not, as a general thing, employ its peculiar remedies when the *remedy at law is full, complete, and adequate:* that is, where the suitor can obtain as complete justice, for all practical purposes, from the law courts as from the court of equity. This principle greatly narrows the scope of the jurisdiction as respects specific performance.

Take a contract for the sale of an ordinary chattel, say 100 bushels of wheat, at $1 a bushel. When the time comes for delivery of the wheat, the market price of wheat is $1.20 a bushel, and the seller refuses to carry out the contract. The damages which a court of law awards are measured by the difference between the contract price and the present market value. Adding these damages—$20—to the sum which he had set aside for his purchases—$100—the buyer can easily obtain in the market wheat of exactly the same grade and quality as that which he bargained for. Equity could do no better for him if it should order the seller to deliver to him 100 bushels. The legal remedy, therefore, is adequate. We may generalize from this example and lay down the rule that equity will *not* grant specific performance of most *contracts relating to ordinary chattels,* since the legal remedy of damages is adequate.

13. **Same subject—Land contracts.**—Does this same course of reasoning apply to a contract for the purchase and sale of land? Plainly, it does not, as an ordinary thing. A man bargains to buy a particular piece of land because there is something about its location or quality that suits his purposes. If the

seller fails to live up to his contract, damages will not, as a general rule, enable the purchaser to buy another tract of land which is the exact equivalent of that which he bargained for. So true is this, as a matter of general experience, that courts of equity ignore the exceptional cases, and assume that damages are *always* an inadequate remedy for the breach of a land contract. The hard and fast rule is laid down, therefore, that specific performance *may always be had of a contract for the sale of land,* provided the contract and the conduct of the parties live up to certain equitable standards which are described later. The fact that with damages the disappointed buyer could purchase a lot next to the one contracted for, substantially similar to it in all respects, is no defense; equity will give him the exact subject of his bargain.[13]

14. **Same subject—Chattel contracts—Exceptional cases.**—The cases, however, are fairly numerous where damages do not enable the purchaser to obtain the substantial equivalent of the article which he contracted to buy. Thus, suppose the subject matter of his contract to purchase consists of shares of stock in a "close" corporation—one whose stock is seldom for sale in the stock market. The purpose of his contract—to become a member of the corpora-

[13] This explanation of the distinction between land and chattels as respects the remedy of specific performance is the one generally given. Perhaps it is better to attempt no explanation of the hard and fast rule relating to land contracts, but to refer simply to the historical fact that courts of equity had been enforcing land contracts as a matter of course for some centuries before they were asked to enforce chattel contracts. The explanation was an afterthought, to account for the courts' refusal to take jurisdiction over chattel contracts.

tion—will not be accomplished by giving him a sum of money in place of the stock. It is generally agreed, therefore, that contracts for the purchase and sale of stock of this character will be specifically enforced.[14] Again, the article may be of such a peculiar value to the individual plaintiff that no damages which a jury would be likely to assess will compensate him for its loss. It may have a sentimental value to him—*pretium affectionis* (the price of affection). This was well illustrated by cases in the southern states, before the Civil War, relating to household slaves; these were deemed to have a special value to the master resulting from their personal traits over and above their market value as laborers or human chattels, and thus were a frequent subject for the exercise of equity jurisdiction. These are mere illustrations drawn from a wide range of contracts where the legal remedy for breach of the contract is inadequate.

15. **Contracts for personal services, building contracts, etc.**—The last illustration may suggest the question: Why are not contracts for personal services generally, or frequently, specifically enforced? At least two important reasons come into play here, which prevent the direct enforcement of such contracts by means of a decree ordering the party to do the act contracted for. In the first place, strong motives of public policy forbid; compulsory service is apt to be inefficient and unsatisfactory.[15] Sec-

[14] New England Trust Co. v. Abbott, 162 Mass. 148, 154, 38 N. E. 432, 27 L. R. A. 271, H. & B. 720. See, also, Equitable Gas Light Co. v. Baltimore Coal Tar, etc., Co., 63 Md. 285, LEADING ILLUSTRATIVE CASES.

[15] De Rivafinoli v. Corsetti, 4 Paige 264 (N. Y.), 25 Am. Dec. 532.

ondly, a contract involving a great many details—such as a contract to build a house, or calling for a great many acts running over a long period of time—such as a contract to operate a railroad—would present a case unduly taxing the time and attention of the court that should attempt to make a decree specifically enforcing the contract. Suppose the defendant against whom such a decree is made should attempt to shirk the work which he is ordered by the court to do; questions would constantly be coming up for the court's decision, whether the defendant had yielded sufficient obedience to the decree or whether he had disobeyed and thus merited punishment for contempt.[16]

Contracts for personal service, for building or construction, and for continuous acts, are, therefore, seldom specifically enforced. Here, however, there are a few exceptional cases, where the court will struggle with the inconvenience of enforcing its decree in order to prevent gross injustice. Suppose a railroad buys a right of way across plaintiff's farm and as a part of the consideration agrees to build a farm crossing through its embankment; and without this crossing the plaintiff will have to take a long roundabout course to reach his fields from his house and barn. The land was acquired from the plaintiff as part of the contract sought to be enforced; the construction called for is on the defend-

[16] Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, 1 Ames, Equity Jurisdiction Cases, p. 70, 2 Keener, Equity Jurisdiction Cases, p. 167, LEADING ILLUSTRATIVE CASES; 2 Scott, Cases on Equity, p. 79; Keith, Prowse & Co. v. National Telephone Co., (1894) 2 Ch. 147 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 188.

ant's land, not on the plaintiff's; and the inconvenience to the plaintiff resulting from the breach of the contract is of a nature very difficult to estimate in damages. The construction work, moreover, is simple; it will not be difficult for the court to determine whether its decree is complied with. In situations of which this is a type, therefore, specific performance has often been decreed of building contracts, or of contracts calling for continuous acts.[17]

16. **Negative contracts—Injunction.**—Contracts for personal services sometimes contain a stipulation that so long as the contract lasts the party will not render services to another person. Thus, Smith, an actor, agrees to perform for Jones, a manager, during the theatrical season, and not to perform for any other person. Smith now breaks his contract and begins to perform for Brown, a rival manager. As we have just seen, the court will not make a decree ordering Smith to act; but, may the court lay hold of the negative stipulation, and by *injunction* order Smith *not* to act for Brown or anyone else except Jones? Such a decree would be open to no objection on the ground of difficulty of enforcement. It would tend to accomplish indirectly what cannot be accomplished directly; for Smith, being debarred by the decree of a means of livelihood other than that provided by his contract, would probably resume the performance of his contract with Jones. After some wavering the English courts, about sixty years ago, in a leading case, issued an injunction on this state

[17] Storer v. Great Western Ry. Co., 2 Younge & C. C. C. 48 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 141.

of facts;[18] and this example has been generally followed in this country. The American courts of equity, however, adhering to the general principle, refuse relief where the legal remedy is adequate, which phrase, in this connection, means where the services are of such an ordinary character that a substitute for Smith can readily be found. Injunction issues only where the services are unique or extraordinary, such as those of a theatrical "star."[19] These cases, consequently, present the curious feature that the attorney for the defense seeks to persuade the court that his client is a person of no reputation, ability, or importance!

Injunction against breach of negative contracts is not confined to service contracts, such as those just mentioned. A common type of negative contract is the covenant made by a man selling out his business or his professional practice not to engage in the business or profession within a certain area. The damages which will result from a breach of such a covenant, consisting in the loss of business which the covenantee will suffer from the prohibited competition, are, obviously, a very hard thing to estimate. Equity, therefore, freely enjoins the breach of such a covenant;[20] unless, indeed, the contract is so

[18] Lumley v. Wagner, 1 De Gex, M. & G. 604 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 93, 2 Scott, Cases on Equity, p. 96, 2 Keener, Equity Jurisdiction Cases, p. 223, H. & B. 614.

[19] Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779, 2 Keener, Equity Jurisdiction Cases, p. 295, H. & B. 614.

[20] Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, 1 Ames, Equity Jurisdiction Cases, p. 123; McClurg's Appeal, 58 Pa. St. 51, H. & B. 751; Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114, 2 Keener, Equity Jurisdiction Cases, p. 300.

framed that it is an unreasonable restraint of trade and therefore void both in law and equity.

17. **Equitable incidents.**—Granting that the contract is one of which equity takes jurisdiction—that is concerns land, or that the legal remedy is inadequate—it must live up to certain requirements which a court of equity exacts. It is often said that the remedy of specific performance is "discretionary." When this phrase is carefully examined it is usually found to mean that equity, in some respects, sets higher ethical standards than a court of law, and demands that the contract or the conduct of the parties comply with these standards.[21]

18. **Same subject—(1) Consideration.**—A contract in equity as in law must be for a valuable consideration. But a promise made for no consideration, but *under seal,* though binding at law, will not be specifically enforced. The seal does not, in equity, take the place of an actual consideration. It is one of the maxims of equity, well illustrated by this rule as to the seal, that "Equity looks at the substance, not at the form."[22]

While a consideration is imperative, the amount of consideration is, of itself, unimportant. The mere fact that land which A agrees to sell for $100, is really worth $1,000—that the consideration is inadequate—is no defense.[23] But this fact, taken in con-

[21] See § 6.

[22] Jefferys v. Jefferys, Cr. & Ph. 138 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 261, 1 Scott, Cases on Equity, p. 303, 2 Keener, Equity Jurisdiction Cases, p. 760.

[23] Burrowes v. Lock, 10 Ves. 470 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 263; Seymour v. Delancy, 3 Cow. 445 (N. Y.), 15 Am. Dec. 270, 2 Keener, Equity Jurisdiction Cases, p. 772.

nection with other facts, may be strong evidence that A was defrauded or imposed upon, so that on these latter grounds the contract is unfit for enforcement.

19. **Same subject—(2) Misrepresentation.**—The plaintiff in a suit for specific performance must have been guilty of no misrepresentations acting as an inducement to the contract. Moreover, such misrepresentations will be a defense though they were made in entire innocence, though the maker of them fully and honestly believed that the statements were true and had good reason for his belief.[24] In this respect the character of the representation which will defeat a contract in equity is entirely different from the willful falsehood which gives rise to an action at law for the tort, deceit.

20. **Same subject—(3) Concealment.**—The American cases appear to agree that the vendee who knows of facts of which the vendor is ignorant—such as the existence of a valuable mine on land which is sold as farm land—greatly enhancing the value of the land, must disclose these facts to the vendor; otherwise, he will lose his right to the remedy of specific performance, though his legal right to damages still remains.[25] This holding illustrates in the plainest manner the "discretionary" nature of this particular remedy; and in establishing this high ethical standard for their suitors, the American courts of equity have gone far in advance of the

[24] Wall v. Stubbs, 1 Madd. 80 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 362, 2 Scott, Cases on Equity, p. 239; Holmes's Appeal, 77 Pa. St. 50.

[25] Byars v. Stubbs, 85 Ala. 256, 4 South. 755, 1 Ames, Equity Jurisdiction Cases, p. 370; Wollums v. Horsley, 93 Ky. 582, 20 S. W. 781, 2 Keener, Equity Jurisdiction Cases, p. 926, 2 Scott, Cases on Equity, p. 251.

modern English courts,[26] a fact which it is well for Americans at the present day to weigh and ponder. It still remains true, however, that the mere failure, without other intervening circumstances, to disclose such secret information is not a ground for setting aside a contract or a deed executed in consummation thereof.[27]

21. **Same subject—(4) Mistake.**—As will be shown in a subsequent chapter,[28] "mutual" mistake, that is, a mistake as to the same thing, shared in by both parties to the contract, is often a good reason in equity for setting the contract aside. When the mutual mistake is of such a character it may, of course, be set up in equity as a defense to the enforcement of the contract. Unilateral mistake, however—a mistake on one side, the other party believing that the contract is what it appears to be—does not invalidate the contract either in law or in equity.[29] Here, again, in granting the discretionary remedy of specific performance, the court sometimes permits a mistake on the defendant's side alone to be set up as a defense. Thus, when there was an ambiguity in the plan or description of the property, though not amounting to a misrepresentation, leading the defendant vendee to suppose that he was getting something different from the thing actually

[26] Turner v. Green, (1895) 2 Ch. 205 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 364.

[27] See § 174.

[28] See § 70.

[29] See § 72; Tamplin v. James, L. R. 15 Ch. Div. 215 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 388, 2 Keener, Equity Jurisdiction Cases, p. 979, 2 Scott, Cases on Equity, p. 277; Western R. R. v. Babcock, 6 Met. 346 (Mass.), 2 Keener, Equity Jurisdiction Cases, p. 937.

sold;[30] or where plaintiff, in accepting defendant's disadvantageous offer, must have known that defendant committed some serious error in calculation;[31] or even in a case where defendant, bidding hurriedly at an auction, without attending to the description of the land, unwittingly purchased an entirely different lot from that which he supposed he was buying,[32] specific performance has been refused on account of the one-sided mistake.

22. **Same subject—(5) Hardship and unfairness.** —If, under the circumstances of the case, the remedy of specific performance would be unduly harsh or oppressive in its effects upon the defendant or upon third persons; or if the contract itself is an unconscientious one or obtained by unfair means, the court often declines to enforce specific performance, and leaves the plaintiff to his remedy at law. In applying these defenses—harshness and unfairness—the court exercises a true discretion, and refuses to be bound down to precise rules; precedents are of little value, the court preferring to apply its standards of justice to each case on its special facts.

The cases, however, admit of classification to a limited extent. In a leading case, a contract was made before the Civil War; by force of acts of Congress, the price was payable in currency, which was

[30] Denny v. Hancock, L. R. 6 Ch. App. 1 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 969; Swaisland v. Dearsley, 29 Beav. 430 (Eng.), 1 Ames, Equity Jurisdiction cases, p. 376.

[31] Webster v. Cecil, 30 Beav. 62 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 382, 2 Keener, Equity Jurisdiction Cases, p. 954, 2 Scott, Cases on Equity, p. 279.

[32] Malins v. Freeman, 2 Keen 25 (Eng.), 1 Ames. Equity Jurisdiction Cases, p. 383, 2 Keener, Equity Jurisdiction Cases, p. 933, 2 Scott, Cases on Equity, p. 272.

greatly depreciated in value; the court, therefore, refused the equitable remedy, unless the plaintiff should consent to pay in gold. Here was an event, utterly unforeseen by the parties when they made the contract, which rendered its enforcement ruinous to one of the parties.[33] If, however, the change of circumstances which renders enforcement a hardship to defendant is one which he should have foreseen, it presents no defense—as where the contract was for the purchase of land, of which he intended to make a particular use, depending on the consent of a third person, and that consent was refused. That a party has speculated and lost is no defense to the enforcement of his bargain in equity or in law.[34] Specific performance, also, has often been refused where it would be of little benefit to plaintiff and a great detriment to defendant or to third parties—as in the case of covenants restricting the use of land;[35] or in the cases relating to the operation of railroads,[36] if enforcement would hamper the company in its paramount duty of safe and convenient service to the public.[37]

[33] Willard v. Tayloe, 8 Wall. 557 (U. S.), 19 L. Ed. 501, 1 Ames, Equity Jurisdiction Cases, p. 404, H. & B. 644, 2 Keener, Equity Jurisdiction Cases, p. 1026, 2 Scott, Cases on Equity, p. 33, LEADING ILLUSTRATIVE CASES. See also Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455, H. & B. 706.

[34] Adams v. Weare, 1 Bro. C. C. 567 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 397, 2 Keener, Equity Jurisdiction Cases, p. 1006, 2 Scott, Cases on Equity, p. 286; Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776, 2 Keener, Equity Jurisdiction Cases, p. 1055.

[35] See § 35.

[36] See § 15.

[37] Conger v. N. Y. W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983, 1 Ames, Equity Jurisdiction Cases, p. 412, H. & B. 723, 2 Keener, Equity Jurisdiction Cases, p. 1046, 2 Scott, Cases on Equity, p. 304.

What shall constitute such unfairness, in the contract itself or the means by which it is procured, as will require the court to decline specific performance, is a question that baffles definition. Mere inadequacy of price, between parties dealing at arms' length and upon equal terms, is not a sufficient defense, as indicated;[38] but the court of equity will readily seize upon any additional inequitable feature, any imposition or sharp practice, inequality of the parties, or even inadvertence resulting in a disastrous bargain, as a sufficient reason for refusing its aid in enforcing the contract.[39]

23. **Same subject—(6) Mutuality.**—Go back for a moment to the contract for personal services. A agrees to deed to B a lot of land; B agrees to pay for it, after conveyance, by painting A's house. A now repents of his bargain, and B sues for specific performance, offering to perform his side of the bargain, viz., do the painting. Should B succeed? It is settled that he cannot. The court cannot compel B to do the painting; and as it cannot give to both parties the remedy in equity, it prefers to give the remedy to neither.[40] When the case comes up for a decree, there must be a *mutuality of equitable remedies.* This simple matter has been and contin-

[38] See § 18.

[39] See Friend v. Lamb, 155 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672, 1 Ames, Equity Jurisdiction Cases, p. 408, 2 Keener, Equity Jurisdiction Cases, p. 1066, 2 Scott, Cases on Equity, p. 306; Kelley v. York Cliffs Improvement Co., 94 Me. 374, 47 Atl. 898, 1 Ames, Equity Jurisdiction Cases, p. 402.

[40] Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131, 1 Ames, Equity Jurisdiction Cases, p. 87; Stocker v. Wedderburn, 3 Kay & J. 393 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 801.

ues to be a curious source of misstatement in judicial opinions and in text-books. It has been stated, in dicta innumerable, that the contract *from the time it is made,* must be "mutual in obligation and in remedy." But when the cases are examined in which the courts have had the opportunity to apply this broad statement of the rule, the decisions almost uniformly contradict it. Thus, where of the two parties to the contract, A and B, A only has signed the memorandum required by the Statute of Frauds, so that at law B may sue A, but A may not sue B, it has been urged that equity, on the principle of mutuality, should withhold relief from both; but this plea has been steadily denied by the courts.[41] B, the plaintiff, can be compelled by the court to do his part in order to obtain the remedy; it is immaterial that A could not have brought an independent suit against B. Or, take the case at the beginning of this paragraph. If B has already done the services, he may successfully sue in equity, in spite of the fact that before such performance by B a suit by A against B in equity would not have lain.[42] Or, take the case of an option to purchase. A, for a consideration (say $10), gives B an option to buy certain land within three months for a certain price. B notifies A within the three months of his intention to buy, offers the price, and A refuses. With a pertinacity truly remarkable, lawyers, relying on the

[41] Hatton v. Gray, 2 Ch. Cas. 164 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 421, 2 Scott, Cases on Equity, p. 129 (Eng.); Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

[42] Howe v. Watson, 179 Mass. 30, 60 N. E. 415, 1 Ames, Equity Jurisdiction Cases, p. 429.

"mutuality" dicta, have insisted that, as there was nothing on which A could sue B before the latter "took up" his option, the courts should not now give the remedy in equity to B; but with equal resolution the courts have turned this argument down.[48] The "mutuality" muddle, in fact, boils down, on close examination, to the simple rule stated at the beginning of this paragraph.

24. **Same subject—(7) Doubtful title.**—Suppose Smith, a vendor, is suing for specific performance of his contract to convey a fee simple to Jones. Smith, of course, in order to succeed, must be able to convey what he contracted to convey, viz., the fee simple; if he owns only a life estate he must fail. Now, suppose that Smith derived his title under the will of Brown, and the language of the will was so ambiguous as to leave it doubtful whether Smith took a fee simple or a life estate under the will. Grant that the court, before which the specific performance suit is pending, is of the opinion that the will gave Smith a fee simple; must it compel Jones to accept Smith's title? The decree of the court will be binding only on the parties to the suit; it will still be open to the heirs of Brown or other persons interested under Brown's will to claim that Smith received by the will, and therefore could convey to Jones a life estate merely. Jones will thus be compelled by the court to buy a lawsuit instead of the flawless title that his contract called for. The opinion of the court in favor of the title will not cure its

[48] McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840, 1 Ames, Equity Jurisdiction Cases, p. 431.

defects. The court, therefore, should not, at suit of the vendor, compel the vendee to accept a doubtful title, a title which other courts may consider invalid; even though the court itself may be of the opinion that his title is good.[44] The vendor should first establish his title by a suit against the adverse claimants and not cast this burden on his vendee.

25. **Time not generally of the essence.**—Must a party to a contract who fails to perform his part on the stipulated date lose all his rights in equity under the contract? A agrees to pay the purchase price and receive his deed on March 1st, but is not ready with his money until April 1st; or, A is ready with his money at the appointed time, but B, the vendor, is not prepared to transfer a perfect title until a month later. Does the party in default forfeit his right to the aid of equity? The answer is, "Time is not of the essence of the contract" in equity; that is to say, the provision as to the time of performance is not an essential term of the contract. Equity abhors forfeitures; and considers that whatever loss is suffered by the delay may be readily compensated in damages; e. g., if the vendee was the party in default, he may be compelled to pay interest on the purchase money as a condition of relief.[45] It must not be inferred, however, that a party may wait indefinitely and still be entitled to the aid

[44] Pyrke v. Waddingham, 10 Hare 1 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 269, 2 Scott, Cases on Equity, p. 361; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521.

[45] Parkin v. Thorold, 16 Beav. 59 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 327; Seton v. Slade, 7 Ves. 265, 271 (Eng.), 2 Scott, Cases on Equity, p. 332.

of equity. If he has waited several years, and especially if his delay has prejudiced the other party, he may be held guilty of *laches*.[46] In determining what constitutes *laches* the court is guided by no fixed standard like the Statute of Limitations; each case depends on its own circumstances.

26. **How time may be made of the essence.**—The rule that time is not of the essence is not pushed to such a length as to defeat the intention of the parties. 1. Time may be made of the essence by an express stipulation of the parties to that effect; the party in default will then be debarred of his remedy in equity.[47] 2. The nature of the contract, or of the subject matter, may indicate that time is essential. It is essential, for example, if the thing is of such a nature that it fluctuates rapidly in value, as mining stock.[48] An option contract must be complied with within the time limited; if A gives B an option to purchase provided B notifies A within three months of his intention to purchase, notice given by B after the expiration of the three months will not avail.[49] 3. Circumstances may show that the parties intended the contract to be complied with at the specified time, or not at all. Thus, if A agrees to sell a house to B, and make title on January 1st, knowing that

[46] Hubbell v. Von Schoening, 49 N. Y. 326, 2 Scott, Cases on Equity, p. 350, 2 Keener, Equity Jurisdiction Cases, p. 1105; Combs v. Scott, 76 Wis. 662, 45 N. W. 532, H. & B. 682, 2 Scott, Cases on Equity, p. 357, 2 Keener, Equity Jurisdiction Cases, p. 1194.

[47] Seton v. Slade, 7 Ves. Jr. 265, 271, 273 (Eng.), 2 Scott, Cases on Equity, p. 332; Sowles v. Hall, 62 Vt. 247, 22 Am. St. Rep. 101, 20 Atl. 810, 2 Keener, Equity Jurisdiction Cases, p. 1117.

[48] See Taylor v. Longworth, 14 Pet. 172 (U. S.), 10 L. Ed. 405.

[49] Lord Ranelagh v. Melton, 2 Drew & S. 278 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 319.

B's lease of his present residence expires on that date, and that B will then require the house for immediate occupancy, A's inability to make out a good title on January 1st is not cured by his ability to do so a month later; circumstances have made time of the essence.[50] 4. Even where time was not originally an essential feature of the contract it may be made essential by means of notice served upon the party in default. If the seller is tired of waiting for his price, he may serve notice upon the purchaser, specifying a reasonable time in which the price must be paid; if the purchaser delays beyond this period so specified, he loses his rights as completely as if time had originally been made essential.[51] In these ways courts of equity guard against the abuse of their general principle that time is not of the essence.

27. **Statute of Frauds—Doctrine of part performance.**—One of the most important and far-reaching principles of equity is that the statute designed for the purpose of suppressing frauds and perjuries shall not itself be made the instrument of committing a fraud.[52] This principle is at the basis of the remarkable doctrine of part performance of parol contracts—one of the commonest doctrines with which American courts of equity have to deal. This doctrine is that oral land contracts may be specific-

[50] Tilley v. Thomas, L. R. 3 Ch. 61 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 336, 2 Scott, Cases on Equity, p. 345, 2 Keener, Equity Jurisdiction Cases, p. 1091.

[51] Parkin v. Thorold, 16 Beav. 59 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 327; Webb v. Hughes, L. R. 10 Eq. Cas. 281, 2 Keener, Equity Jurisdiction Cases, p. 1101.

[52] Pomeroy, Equity Jurisprudence, § 921, and cases cited.

ally enforced, notwithstanding the Statute's requirement of a written memorandum, provided that certain steps have been taken, after the contract has been made, toward putting it into effect.

Two ideas underlie the doctrine and account for the special rules laid down by the cases—rules which at first sight seem somewhat arbitrary. Suppose one party to the oral contract, relying on the good faith of the other party, is encouraged or permitted by that other to do acts in pursuance of the contract whereby his position is irrevocably changed—acts which cannot be "undone." Justice then demands that the other party be "estopped" from setting up the Statute as a defense. Or, suppose the act done in pursuance of the contract is one which, considered by itself, is strong circumstantial evidence of the existence of the contract—one which a bystander, wholly ignorant of the existence of the contract, would take as a sure indication that there was a contract between the parties concerning the land—then there is, in place of a written memorandum, evidence of nearly as high a grade to prove the contract's existence; though, of course, the exact *terms* of the contract must still be proved by oral evidence. Whether or not this doctrine of part performance, based upon these two ideas, was a reasonable exercise of judicial power, is a question which necessarily admits of two opinions; but the doctrine is firmly established in England and in all the state jurisdictions but four, and has even been confirmed in many of the states by the express language of the Statute.

28. **Acts of part performance—Payment.**—Shall specific performance of the oral land contract be granted, merely because the vendee has paid part or all of the purchase price? Applying the "estoppel" test, the act may readily be "undone" by recovery of the money in an action at law. Applying the "evidence" test, payment of money is not necessarily circumstantial evidence of any contract between the parties whatever, much less of a contract regarding a particular piece of land. Payment, therefore, is not an act which demands the specific performance of the contract.[53]

29. **Same subject—Possession—Improvements.**—Suppose that the vendee, in pursuance of the contract, goes into possession of the land with the consent of the vendor; if his taking possession includes a removal of his residence or place of business, it involves an expenditure of time and money which will be a dead loss to him if the vendor relies on the Statute of Frauds and ejects him. These expenditures cannot be "undone;" they are irrevocable. Also, his being in possession with the consent of the vendor is a thing which would strike a bystander as a convincing piece of circumstantial evidence that a contract relating to the land exists between him and the legal owner. The English courts established the rule, almost as soon as the Statute of Frauds was passed, that the vendee who has thus taken possession may have his oral contract enforced in equity

[53] Clinan v. Cooke, 1 Sch. & Lef. 22 (Ire.), 2 Scott, Cases on Equity, p. 182, 2 Keener, Equity Jurisdiction Cases, p. 628; Lord Pengall v. Ross, 2 Eq. Ca. Abr. 46 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 276, 2 Scott, Cases on Equity, p. 180.

notwithstanding the Statute; justifying the rule on one or the other of the reasons stated.[54]

If the vendee, in addition to taking possession, has made valuable improvements on the land the reasons for the rule are thereby strengthened.[55]

30. **Same subject—Continuance in possession.**—Take, next, the situation where the plaintiff was already in possession—say, as a tenant under a lease which is about to expire—when the oral contract for sale or for renewal of the lease was made. Shall his continuance in possession after his lease has expired justify specific performance? Apply the two tests again. Plainly, since he has not changed his position in reliance on the oral contract, the "estoppel" test fails; the "evidence" test fails likewise, since his remaining in possession does not necessarily tend to prove a contract. The bystander, not knowing of the new contract, would infer that he was very likely a "hold-over" tenant, remaining on sufferance after the expiration of the lease.[56] If, however, he has on faith of the oral contract, made expenditures upon the land of such an amount as a tenant would not make under a lease that is about

[54] Butcher v. Stapeley, 1 Vern. 363 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 279, 2 Scott, Cases on Equity, p. 188, 2 Keener, Equity Jurisdiction Cases, p. 622; Gallagher v. Gallagher, 31 W. Va. 9, LEADING ILLUSTRATIVE CASES.

[55] The American cases, on the whole, seem to demand some act in addition to taking possession—a fact which has escaped the attention of commentators; see 36 Cyc. 656. Possession with part payment, or possession with improvements will answer. I am unable to explain the origin of this American rule: unless, possibly, it is a concession to the popular feeling that a bargain is not a bargain unless something is paid as earnest money.

[56] Wills v. Stradling, 3 Ves. 378 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 291, 2 Scott, Cases on Equity, p. 201, 2 Keener, Equity Jurisdiction Cases, p. 626.

to expire or has expired, he has done an act which satisfies the "tests," and hence may have specific performance.[57]

31. **Same subject—Services.**—Payment in services will not, as a general rule, take the contract out of the Statute any more than payment in money. To this rule a striking exception has been made by the majority of the recent American cases, thereby disregarding a decision[58] of great technical learning and ability made by the highest English court. Some services, say these cases, cannot be measured by their money value, and were not intended to be so measured. Services of affection rendered by a child to its parent, the tender nursing and care of an aged relative, and the like, rendered as consideration for the oral promise, cannot be compensated by money damages. By the "estoppel" test, therefore, the plaintiff is entitled to specific performance. By the "evidence" test, however, the services, whether of a common or extraordinary nature, do not point to or afford circumstantial evidence of a land contract; hence the plaintiff should fail. The two tests lead to different results. Which shall control? The fact that most American courts adopt the first test[59] in preference to the second is one illustration, among

[57] Mundy v. Joliffe, 5 Mylne & C. 167 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 289; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537, 2 Keener, Equity Jurisdiction Cases, p. 706.

[58] Maddison v. Alderson, L. R. 8 App. Cas. 467 (H. of L.), 1 Ames, Equity Jurisdiction Cases, p. 295, 2 Scott, Cases on Equity, p. 210, 2 Keener, Equity Jurisdiction Cases, p. 675.

[59] Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 Atl. 3; Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207. *Contra*, Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, 2 Keener, Equity Jurisdiction Cases, p. 726, 2 Scott, Cases on Equity, p. 219.

many, of the liberal views of American equity courts, in contrast with the over-technicality of modern English equity.

32. **Partial specific performance with compensation.**—It often happens that the vendor is unable to convey exactly what he contracted to convey; that the land is deficient in amount, or in quality, or is subject to an easement, or that the vendor has not a full estate in fee simple, etc. Must specific performance necessarily fail? The rules are different according as the vendor or the vendee is the plaintiff. If the vendor is suing, and the defect is unimportant—if, after making allowance for the defect the vendee will get substantially what he contracted for, the court will compel the vendee to take the land, with a deduction from the purchase price.[60] Thus, if the vendor of a large farm has no title or a bad title to ten acres of rocky pasture land of no special value to the vendee, he may have specific performance at a reduced price. If, however, the defect concerns an important or essential matter—if, for example, title to the part of the farm on which the farm buildings stood was defective—specific performance would be refused.[61]

Where the vendee is plaintiff, the rule is different. If he entered into the contract in ignorance of the defect, he may compel conveyance of whatever the

[60] Halsey v. Grant, 13 Ves. 73 (Eng.), 2 Scott, Cases on Equity, p. 379; King v. Bordeau, 6 Johns. Ch. 38 (N. Y.), 10 Am. Dec. 312, 2 Keener, Equity Jurisdiction Cases, p. 1123, 2 Scott, Cases on Equity, p. 387.

[61] Perkins v. Ede, 16 Beav. 193 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 247, 2 Keener, Equity Jurisdiction Cases, p. 1128, 2 Scott, Cases on Equity, p. 376.

vendor has with a proportionate abatement from the price, even though the defect is very considerable,[62] though the vendor owns but half the land, or owns a life estate merely instead of a fee simple, etc. To this rule there is an important exception in many states; if the defect consists in the inchoate dower interest of the vendor's wife, who has not joined in the contract, no abatement will be made; for the reason, among others, that the present value of such an interest is very difficult to estimate.[63] If, however, the vendee knew of the defect when he made the contract—if he entered into the contract with his eyes open—he has no claim to an abatement from the price,[64] though he may, of course, if he sees fit to accept the land with its defects, and to pay the full price, compel a conveyance of whatever the vendor is able to convey.

33. **Specific performance against third persons.**—The vendor, instead of conveying to the plaintiff, a purchaser, breaks his contract by conveying the legal title to a third person. A conveyance by the vendor to the original purchaser will now be useless, as he has nothing to convey. Is the purchaser, then, remitted to his remedy at law for damages? The answer may be yes or no. His "equity" (that is,

[62] Barnes v. Wood, L. R. 8 Eq. 424 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 249, 2 Keener, Equity Jurisdiction Cases, p. 1228, 2 Scott, Cases on Equity, p. 395.

[63] Riesz's Appeal, 73 Pa. St. 485, 1 Ames, Equity Jurisdiction, p. 254; Peeler v. Levy, 26 N. J. Eq. 330, 2 Keener, Equity Jurisdiction Cases, p. 1236.

[64] Castle v. Wilkinson, L. R. 5 Ch. App. 534 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 252, 2 Keener, Equity Jurisdiction Cases, p. 1208, 2 Scott, Cases on Equity, p. 395.

his right to an equitable remedy) having once attached to the land follows the land until it comes into the hands of the purchaser of the legal title who is a *bona fide purchaser for a valuable consideration and without notice.* If the third person who received the legal title is a *volunteer;* that is, if he paid no valuable consideration for his purchase; or if before paying the price and receiving the legal title he had *notice* of the original purchaser's contract right and resulting "equity" of specific performance, he takes the legal title subject to the plaintiff's "equity": the plaintiff may enforce the remedy of specific performance against him as freely and on the same terms as against the vendor if the vendor had retained the title. This is a doctrine of equity of far reaching importance. What is meant by "valuable consideration" and by "notice" will be explained in a later chapter.[65]

34. **Same subject—Equitable easements.**—A makes a deed of land to B; B at the same time covenants with A, in behalf of himself, his heirs and assigns, restricting the use of the land in some way; for example, that it shall not be used except for dwelling house purposes, or that intoxicating liquors shall not be sold on the premises, or the like. Now, as this is a negative agreement concerning land, and the damage to A from its breach is conjectural, or hard to estimate, A is clearly entitled to enjoin a breach of it by B. How about a breach of it by B's successor in interest? Applying the principle of the last paragraph, so long as B's successor in the legal

[65] See Chapter XIV.

title is a volunteer or a purchaser with notice of the covenant, the covenant may be specifically enforced by means of an injunction against its breach.[66]

May anyone besides A enforce the covenant against B or B's successor? Suppose A originally owned two adjoining lots and sold one of them to B with a restrictive covenant as above. A's intent in inserting the covenant in the deed may have been merely to secure his own personal comfort and freedom from annoyance so long as he remained owner of the other lot; or his intention may have been permanently to benefit the other lot, in whosesoever hands it may come. If the latter is proved, by circumstances, or otherwise, to have been A's intent, C, the purchaser of the other lot from A, acquires not only A's interest in the lot, but also A's interest in B's covenant. C or C's successors in the second lot, therefore, may enjoin the breach of the covenant by B or B's successors.[67]

35. **Same subject—Equitable easements continued.**—Covenants like these, creating "equitable easements," as they are sometimes called, have become very common in American cities, and are of great value in preserving the character and value of city land for residence purposes. A common example is presented where a suburban tract is subdivided and sold in lots, each deed containing simi-

[66] Tulk v. Moxhay, 2 Phill. Ch. 774, 777 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 147, 2 Keener, Equity Jurisdiction Cases, p. 545, 2 Scott, Cases on Equity, p. 486; Whitney v. Union Ry., 11 Gray 359 (Mass.), 71 Am. Dec. 715, 2 Keener, Equity Jurisdiction Cases, p. 547.

[67] Peck v. Conway, 119 Mass. 546, 1 Ames, Equity Jurisdiction Cases, p. 162, 2 Scott, Cases on Equity, p. 527, 2 Keener, Equity Jurisdiction Cases, p. 509; Badger v. Boardman, 16 Gray 559 (Mass.), 2 Keener, Equity Jurisdiction Cases, p. 473.

lar restrictive covenants regarding the size and location of houses, etc. It will be inferred that the covenant in each deed is for the benefit not merely of the speculator who sells the lots, but for each and every other lot owner in the entire "building scheme."[68]

The injunction by which such covenants are enforced is really a suit for specific performance, and hence subject to the same equitable defenses. Suppose B's covenant with A was, not to use the land for business purposes. In the course of time, the neighborhood, originally residential, has, with the growth of the city, become devoted to business chiefly. To enforce the covenant, therefore, will be of little or no benefit to A, while B by such enforcement, will be deprived of the most profitable use of his land. The purpose of the restriction has, by force of circumstances, entirely failed. Equity, therefore, will not impose upon B or his successors the hardship of complying with the covenant.[69]

36. **Death of parties to contract.**—A contracts to convey land to X by a valid contract, and X then dies before the contract is carried out, leaving Y, X's personal representative (administrator) and Z, X's heir. Who succeeds to the benefit of the contract? X, before his death, had no legal title; how,

[68] Nottingham, etc., Co. v. Butler, L. R. 16 Q. B. D. 778 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 169, 2 Scott, Cases on Equity, p. 530, 2 Keener, Equity Jurisdiction Cases, p. 519; De Gray v. Monmouth Beach Clubhouse Co., 50 N. J. Eq. 329, 24 Atl. 388, 2 Scott, Cases on Equity, p. 534.

[69] Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, 1 Ames, Equity Jurisdiction Cases, p. 179, LEADING ILLUSTRATIVE CASES; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365, 2 Keener, Equity Jurisdiction Cases, p. 1038.

then, can Z, on X's death, have any interest in the land by inheritance?

We find that equity attributes to the contract the remarkable effect that from the moment it is made, the vendee, X, is regarded as the *real owner* in equity. He owns an *equitable estate* in the land; though until conveyance the legal title is still in A, the vendor. There is a maxim, of which this is one of several applications, that "Equity looks upon that as done which ought to be done."[70] The vendor "ought"—that is, he owes a legal duty—to convey. In determining what property rights the parties to the contract have, equity treats the situation as if this duty had been accomplished and the conveyance actually made. Since X was owner, Z, his heir, inherits his equitable ownership and can call on A for a conveyance. Y, the administrator, however, must pay the dead man's debts out of the personal estate; Z, therefore, may compel Y to pay the purchase price.[71]

Suppose A, the vendor, dies, leaving B, his administrator, and C, his heir. The legal title to the land, of course, descends to C; the equitable title, from the date of the contract, has passed to X. What interest remained in A after the contract, other than his legal title to the land? Plainly, only the claim on X for the purchase money. It is sometimes said that A's interest is *converted* by the contract from land to personal assets. The claim for the money,

[70] See § 227.

[71] Milner v. Mills, Mos. 123 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 191; Langford v. Pitt, 2 P. Wms. 629 (Eng.), 2 Scott, Cases on Equity, p. 405, 2 Keener, Equity Jurisdiction Cases, p. 333.

like other personal claims, passes on A's death to B, his administrator. B, therefore, may sue X for the purchase money, compelling C, the heir, to convey the land to X.[72]

37. **Vendor's lien.**—A, the vendor, retains the legal title to the land. Unless the contract otherwise provides, he is not compelled to part with the legal title to X until he has received the purchase money. His situation is very similar to that of a mortgagee. A mortgagee receives from the mortgagor a conveyance of land and may retain the legal title until his debt is paid. The analogy of vendor to mortgagee is almost complete. Both have an *equitable lien* on the land to secure the payment of a sum of money. Such lien may be defined, at present, as a right to *foreclose*—that is, to have a sale made of the land affected by the lien, under the direction of the court, as a result of a foreclosure suit. If the vendee delays beyond the day appointed by the contract for the payment of the money, the vendor may get his money by foreclosure suit and sale.[73]

Suppose the vendor assigns his claim for the purchase money; the assignee, of course, succeeds to the vendor's personal claim against the vendee. Does he get anything else? Does he get this vendor's lien which we have just described?

[72] Bubb's Case, 2 Freem. Ch. 38 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 194; Keep. v. Miller, 42 N. J. Eq. 100, 6 Atl. 495, 1 Keener, Equity Jurisdiction Cases, p. 328, H. & B. 157.

[73] Haughwout v. Murphy, 22 N. J. Eq. 531; Button v. Schroyer, 5 Wis. 598, 1 Ames, Equity Jurisdiction Cases, p. 225; Lewis v. Hawkins, 23 Wall. 119 (U. S.), H. & B. 665.

There seems to be some difficulty here. The vendor has assigned his debt, but not the legal title to the land by which the debt is secured. How can a person have the benefit, as security, of property the title to which is in another? The difficulty is not insuperable. Equity holds that the lien of the security, whether it be a mortgage or the vendor's legal title, follows the debt as the shadow follows the substance. The assignment of the debt carries with it the lien in equity. The vendor holds the naked legal title for the benefit of his assignee, to secure the payment of the debt; the assignee may, therefore, bring a suit to foreclose the vendor's lien, making the vendor a party, and have a judicial sale of the property to raise the money just as the vendor himself could have done if he had retained the ownership of the debt.[74]

38. **Waste or destruction of the premises.**—If the vendor remains in possession, by himself or another, after the contract, he must bear in mind that the substantial ownership of the property is now in the vendee. He must, therefore, take the same care of the premises that is required of a trustee with reference to property under his control.[75] On the other hand, if the purchaser goes into possession before paying the price in full, he must recognize the fact

[74] Graham v. McCampbell, Meigs 52 (Tenn.), 33 Am. Dec 126, 1 Ames, Equity Jurisdiction Cases, p. 205.

[75] Clarke v. Ramuz, (1891) 2 Q. B. 456 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 222, 2 Keener, Equity Jurisdiction Cases, p. 380, 2 Scott, Cases on Equity, p. 424; Bostwick v. Beach, 105 N. Y. 661, 12 N. E. 32, H. & B. 663.

that the vendor retains the legal title as security, and must not commit such waste as will impair the value of his security; such waste on his part may be enjoined by the vendor.[76]

If the premises are accidentally destroyed by fire or earthquake after the making of a valid contract of sale, who shall bear the loss? Equity follows out the principle to its logical consequences. Ownership in equity devolved on the purchaser as soon as the contract was made; therefore, the loss is his. The vendor may have specific performance of the contract without deduction from the price because of the loss. It makes no difference (according to the great weight of authority) that the vendor was in possession when the loss occurred.[77] Of course, if the fire was caused by the vendor's negligence, the rule is otherwise. If the vendor had insurance on the premises, he holds the insurance money collected for the benefit of the purchaser, since the vendor is trustee of the property and its proceeds for the purchaser.[78]

39. **Summing up specific performance.**—Consider the important general principles or subjects of equity which have been illustrated by these special

[76] Crockford v. Alexander, 15 Ves. 138 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 221, 1 Keener, Equity Jurisdiction Cases, p. 549.

[77] Paine v. Meller, 6 Ves. 349 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 227, 2 Keener, Equity Jurisdiction Cases, p. 403, 2 Scott, Cases on Equity, p. 450; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582, 1 Scott, Cases on Equity, p. 425, 2 Keener, Equity Jurisdiction Cases, p. 421, LEADING ILLUSTRATIVE CASES.

[78] Reed v. Lukens, 44 Pa. St. 200, 84 Am. Dec. 425 and note, 2 Scott, Cases on Equity, p. 455; *contra*, Rayner v. Preston, L. R. 18 Ch. Div. 1 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 229, 2 Scott, Cases on Equity, p. 458.

rules governing this equitable remedy. (1) The general principle of jurisdiction, that a court of equity will not take jurisdiction where there is an adequate remedy at law.[79] Several of the general maxims of equity, viz.: (2) Equity looks at the substance of the transaction, not the form.[80] (3) Equity regards that as done which ought to be done.[81] (4) He who seeks equity must do equity.[82] (5) He who comes into equity must come with clean hands.[83] (6) The general doctrine as to bona fide purchaser without notice.[84] (7) Distinctive rules of equity as to fraud; especially (8) the doctrine that the Statute of Frauds shall not be made an instrument of fraud. (9) Inadequacy of consideration as a defense or ground of relief.[85] (10) Mistake.[86] (11) Equitable estates.[87] (12) Equitable liens, their enforcement and assignment.[88] (13) The duties of a trustee.[89]

[79] See § 229.
[80] See § 226.
[81] See § 227.
[82] See §§ 219, 220.
[83] See §§ 221, 222.
[84] See §§ 207-211.
[85] See § 176.
[86] See §§ 67-81.
[87] See § 118.
[88] See §§ 161-163, 154.
[89] See § 135.

CHAPTER III.

INJUNCTIONS.

40. **Injunctions—Torts.**—Equity has jurisdiction over torts chiefly by means of the remedy of injunction—an order not to commit the threatened tort, under penalty of punishment for contempt. This is the ordinary preventive injunction. To a limited extent, equity may order the person committing the tort to restore things to the condition in which they were before the tort was committed. This is a mandatory injunction. Injunction may issue at the end of the suit, in which case it is called final; or at the beginning or during the progress of the suit, in which case it is called, variously, a preliminary, temporary or interlocutory injunction.

41. **Waste.**—The term "waste" is here used in its technical legal sense, implying that the person permitting or doing the wrongful or destructive act is in rightful possession of the premises—usually as a tenant for life or tenant for years. If he is in wrongful possession then the tort is trespass.

Nearly all acts of waste which would give rise to an action of law may be enjoined. The commonest acts are, cutting timber,[90] mining or quarrying,[91]

[90] Kane v. Vandenburgh, 1 Johns. Ch. 11 (N. Y.), 1 Keener, Equity Jurisdiction Cases, p. 455, 1 Scott, Cases on Equity, p. 661.

[91] Whitfield v. Bewit, 2 P. Wms. 240 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 450, 1 Keener, Equity Jurisdiction Cases, p. 457, 1 Scott, Cases on Equity, p. 674.

changing, destroying, or removing buildings.[92] Equity also intervenes by injunction in a number of instances, which need not be particularized, where technical legal rules as to parties do not permit an action at law to lie.[93] A common situation is that where a mortgagee or other lien holder sues to prevent waste by the mortgagor or other person in possession, on the ground that it threatens to impair the sufficiency of his security—that is, that the waste renders it probable or possible that a foreclosure sale will not yield the full amount of the debt.[94] Another frequent occasion for granting a writ of injunction is waste by a tenant in common in possession committing acts that a prudent manager would not commit.[95]

The plaintiff may not sue in equity merely to obtain an accounting for waste that has already been committed, since the legal action for damages is an adequate remedy.[96] But, if he sues for and obtains an injunction against future waste, the court of equity, in order to save him the trouble and expense

[92] Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469, 1 Scott, Cases on Equity, p. 668.

[93] Mollineux v. Powell, 3 P. Wms. 268 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 468, 1 Scott, Cases on Equity, p. 664; Skelton v. Skelton, 2 Swanst. 170 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 473, 1 Keener, Equity Jurisdiction Cases, p. 430, 1 Scott, Cases on Equity, p. 656.

[94] Usborne v. Usborne, Dick. 75 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 452; Brady v. Waldron, 2 Johns. Ch. 148 (N. Y.), 1 Ames, Equity Jurisdiction Cases, p. 483, 1 Scott, Cases on Equity, p. 661.

[95] Hawley v. Clowes, 2 Johns. Ch. 122 (N. Y.), 1 Ames, Equity Jurisdiction Cases, p. 484, 1 Scott, Cases on Equity, p. 663.

[96] Jesus College v. Bloom, Amb. 54 (Eng.), 3 Atk. 262 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 481, 1 Keener, Equity Jurisdiction Cases, p. 404, 1 Scott, Cases on Equity, p. 115; Watson v. Hunter, 5 Johns. Ch. 169 (N. Y.), 9 Am. Dec. 295, 1 Scott, Cases on Equity, p. 642.

of a separate action for the past waste, will give him an accounting.[97] We have here an illustration of a general principle of equity jurisdiction, applying to all its remedies, that the court of equity, having obtained jurisdiction for one purpose, will retain it for the purpose of complete relief, so as to dispose of the whole controversy in a single suit; and this is true, although some of the relief asked is of such a nature that the remedy at law is ordinarily adequate.[98]

42. **Equitable waste.**—Several centuries ago, in order to relieve the life tenant or other holder of an estate less than a fee from the onerous responsibility for technical waste, it became common to insert in family settlements the words "without impeachment of waste." These words were interpreted by the law courts as giving the tenant a free hand to commit any acts of destruction upon the premises. He might strip the land of all its timber, or tear down the mansion home, with perfect impunity, purely out of motives of malice toward his successor in the estate. Equity, thereupon, stepped in and invented its doctrine of "equitable waste"; i. e., acts such as destruction of buildings, and cutting of ornamental trees, though done by a tenant "without impeachment of waste," who is therefore legally irresponsible, will be enjoined. Equity, it is said, "will not permit an unconscientious use to be made of a legal power." There has been little occasion for American courts to apply this doctrine; it is men-

[97] Jesus College v. Bloom, note 96.
[98] See § 230.

tioned because there is no doctrine more characteristic of the spirit of equity jurisprudence.[99]

43. **Trespass—Grounds for injunction.**—Courts of equity, though they have been enjoining waste for centuries, did not begin to enjoin trespass until about one hundred years ago. Traces of this early reluctance to interfere are found in the decisions of many American courts to this day. In every case the main question is, has the plaintiff an adequate remedy at law, either by the action of trespass, or (where defendant is in possession) by ejectment? If the acts of trespass are few or temporary, causing no serious injury, equity will not interfere. Thus, when A was given a certain time to remove a pile of bricks belonging to him from B's premises and failed to remove them within the time, equity would not prohibit A from entering on B's premises a few times without authority for the purpose of removing the bricks.[1] If, however, the injury is "irreparable"—incapable of repair—an injunction will lie. While there is some difference of opinion as to the meaning of this word "irreparable," most cases hold that removing or destroying the substance of the estate of the plaintiff is of itself an "irreparable" injury, even though the plaintiff is not damaged to a large amount. Thus, removing buildings,[2] taking ore or

[99] Vane v. Lord Barnard, 2 Vern. 738 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 470, 1 Keener, Equity Jurisdiction Cases, p. 455; Micklethwait v. Micklethwait, 1 De G. & J. 504, 524 (Eng.); Turner v. Wright, 2 De G. F. & J. 234, 243 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 476, 1 Keener, Equity Jurisdiction Cases, p. 441.

[1] Gates v. Johnstown Lumber Co., 172 Mass. 495, 52 N. E. 736, 1 Ames, Equity Jurisdiction Cases, p. 520.

[2] Echelkamp v. Schrader, 45 Mo. 505, 1 Ames, Equity Jurisdiction Cases, p. 511.

stone,[3] cutting timber[4] (by the majority rule), fall within the definition. Where the defendant was about to run a tunnel under the plaintiff's land, far beneath the surface, and threatening no injury to the surface, it was properly held that the act was irreparable, since though in a sense harmless, it involved the removal of a part of the substance of the earth belonging to the plaintiff.[5] Closely akin to the last case is another ground for injunction; the defendant must not be permitted to appropriate to himself permanently, without authority, land which the plaintiff owns, even though the land itself be of little value to the plaintiff. Defendant's willingness and ability to pay damages does not justify him in taking his neighbor's land. Thus, in a leading English case, a water company laid pipes through a street the soil of which was owned by the plaintiff. The pipes did the plaintiff no harm; yet he was entitled to an injunction. The real value of the land to the plaintiff lay in the fact that his ownership of the land, otherwise useless to him, enabled him to exact a price from the defendant for its use.[6]

Again, suppose a defendant is committing numerous trespasses—for example, is repeatedly tearing

[3] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1116, 1 Ames, Equity Jurisdiction Cases, p. 507, 1 Scott, Cases on Equity, p. 704, 1 Keener, Equity Jurisdiction Cases, p. 634.

[4] Lowndes v. Bettle, 3 New. R. 409 (Eng.), 33 L. J. Ch. 451, 10 Jur. N. S. 226, 1 Ames, Equity Jurisdiction Cases, p. 499, 1 Scott, Cases on Equity, p. 697, 1 Keener, Equity Jurisdiction Cases, p. 604; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427, 1 Keener, Equity Jurisdiction Cases, p. 636, H. & B. 762.

[5] Richards v. Dower, 64 Cal. 62, 28 Pac. 113, 1 Ames, Equity Jurisdiction Cases, 517.

[6] Goodson v. Richardson, L. R. 9 Ch. 221 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 502, 1 Keener, Equity Jurisdiction Cases, p. 615.

down plaintiff's fence, or crossing plaintiff's land, and threatens to continue his trespasses indefinitely. Each trespass in itself is trifling; but plaintiff, in the long run will have to bring numerous actions at law for damages. This fact affords an independent reason for injunction, without regard to the seriousness of the injury. Avoidance of a multiplicity of suits is an important ground of equity jurisdiction.[7]

44. **Same subject—Title in dispute—Preliminary injunction.**—If the defendant sets up that he is the true owner and that therefore the alleged acts of trespass are the lawful exercise of his rights of ownership; as, for example, where the defendant claims to own the strip of land on which plaintiff's house is situated, and is proceeding to tear down and remove the house—plainly, the plaintiff cannot have a permanent injunction until the title to the land is in some way settled in plaintiff's favor.[8] Where the title is thus in dispute, equity has the power to decide the question of title itself; but the more usual practice is to await the establishment of the disputed title by trial in a court of law.[9] Meanwhile, must the plaintiff submit to having the house torn down? If the injury threatened is of the "irreparable" class, a preliminary injunction will issue pending the determination at law of the plaintiff's rights.[10] Where,

[7] Musselman v. Marquis, 1 Bush 463 (Ky.), 89 Am. Dec. 637, 1 Keener, Equity Jurisdiction Cases, p. 193.

[8] Echelkamp v. Schrader, 45 Mo. 505, 1 Ames, Equity Jurisdiction Cases, p. 511.

[9] Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427, 1 Keener, Equity Jurisdiction Cases, p. 636, H. & B. 762.

[10] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1116, 1 Ames, Equity Jurisdiction Cases, p. 507, 1 Keener, Equity Jurisdiction Cases, p. 624, 1 Scott, Cases on Equity, p. 704.

however, the injury is not irreparable, but is in the "continuous or repeated trespass" class, it seems that the case does not call for a preliminary injunction, though it may demand a permanent injunction after the plaintiff's rights are settled; for the plaintiff can hardly be involved in any serious "multiplicity of suits" by the trespasses of the defendant during the limited period while the trial at law is going on.[11] If defendant is in possession, the court should be careful to avoid enjoining him from the ordinary, non-destructive use of the premises, pending the ejectment suit.[12]

45. **Same subject—Mandatory injunction.**—If the defendant's trespass consisted in the erection of buildings, structures or obstructions on the plaintiff's land, mandatory injunction is the remedy to compel their removal.[13] Where the defendant has thus willfully encroached upon the plaintiff's property, such injunction should issue, though the loss occasioned to the defendant by the removal is much greater than the value of the land to the plaintiff. A man may not force a sale to him by his neighbor by the mere act of building on his neighbor's land. If, however, the encroachment is slight, and resulted from an innocent mistake as to the true boundary, there is authority for holding that the court will

[11] New York, etc. Establishment v. Fitch, 1 Paige 97 (N. Y.), 1 Keener, Equity Jurisdiction Cases, p. 502.

[12] Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367, 1 Ames, Equity Jurisdiction Cases, p. 509.

[13] London, etc. Ry. Co. v. Lancashire, etc. Ry. Co., L. R. 4 Eq. 174, 1 Ames, Equity Jurisdiction Cases, p. 525; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405, 1 Ames, Equity Jurisdiction Cases, p. 527, 1 Keener, Equity Jurisdiction Cases, p. 194, 1 Scott, Cases on Equity, p. 94, H. & B. 764, LEADING ILLUSTRATIVE CASES.

deny the injunction and leave the plaintiff to his remedy at law.[14]

46. **Trespass to personal property.**—Detention of, or injury to, or conversion of personal property is rarely enjoined; since damages recovered at law will usually compensate the plaintiff for the detention, or enable him to repair or replace the injured or converted chattel. If, however, the chattel is of the kind which cannot be replaced, its conversion may be enjoined. The rules are practically the same as those relating to specific performance of chattel contracts. Sometimes, too, the conversion may result in damage of a serious nature, but too remote to be the subject of recovery in an action at law. Thus, suppose the judgment creditor of B, claiming that A's stock of goods really belong to B, directs the sheriff to levy execution thereon. A's business may be ruined, and A reduced to bankruptcy by the execution sale; but the damages which A can recover for the conversion will not include this remote injury, but only the value of the goods. A, therefore, needs an injunction against the threatened sale, until the ownership of the goods is determined.[15]

47. **Nuisance—What nuisances are enjoined.**—In determining what constitutes a nuisance equity follows the law. If the acts complained of do not warrant an action at law for damages, they do not authorize an injunction. "There is no such thing as

[14] Lynch v. Union Institut., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, 1 Keener, Equity Jurisdiction Cases, p. 647; Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17, 1 Ames, Equity Jurisdiction Cases, p. 529.

[15] Watson v. Sutherland, 5 Wall. 74 (U. S.), 18 L. Ed. 580, 1 Ames, Equity Jurisdiction Cases, p. 531, H. & B. 741, 1 Scott, Cases on Equity, p. 134.

an equitable nuisance," in the sense of something actionable in equity but not at law.[16] The general grounds for exercising equitable jurisdiction are the same as those in trespass cases, viz., irreparable injury, or multiplicity of suits from the continuance or repetition of the nuisance. As in the case of trespass, an occasional or temporary nuisance, not productive of serious injury, will not be enjoined.[17] A continuing nuisance may be enjoined, though the damages that would be recovered in an action at law would be small; such a nuisance as the pollution of a stream, rendering it unfit for domestic use, although the plaintiff would not have used the stream if it had been left unpolluted.[18]

48. **Same subject—Trial at law.**—If it is doubtful whether a nuisance really exists, the usual practice is to settle the question by a trial at law before granting a permanent injunction. If, however, the existence of the nuisance seems to the equity court to be clear, the injunction will issue without requiring the verdict of a jury.[19]

49. **Same subject—Preliminary injunction.**—As serious injury may result to the plaintiff from the continuance of the alleged nuisance during the progress of the trial in equity, or at law, a preliminary

[16] Soltau v. De Held, 2 Sim. N. S. 133, 151 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 665, 1 Scott, Cases on Equity, p. 717.

[17] Swaine v. Great Northern Ry. Co., 4 De G. J. & S. 211 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 569, 1 Scott, Cases on Equity, p. 743.

[18] Mann v. Willey, 51 App. Div. 169 (N. Y.), 64 N. Y. Sup. 589, 1 Ames, Equity Jurisdiction Cases, p. 572; affirmed, 168 N. Y. 664, 61 N. E. 1131.

[19] Crowder v. Tinkler, 19 Ves. 617 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 555; Turner v. Mirfield, 34 Beav. 390 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 558; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

injunction is often appropriate although the existence of the nuisance is disputed. In doubtful cases the court will often "balance the injuries," as it is called. Whether the court grants or refuses the injunction on incomplete evidence, in advance of trial, it is in danger of making a mistake—it is in danger, on the one hand, of enjoining an act which, it may turn out, the defendant may lawfully do; or, on the other hand, of refusing to aid a plaintiff who needs immediate relief and turns out to be entitled to relief. In doubtful cases, therefore, the court considers which party has most at stake—which will suffer most by the granting or refusal of the injunction. If to issue the preliminary injunction will do great damage to defendant—will, for example, put a stop to a valuable business—while allowing the alleged nuisance to continue pending the suit will be comparatively a slight inconvenience to plaintiff, the court will refuse the injunction.[20] If, on the other hand, the plaintiff will suffer a greater injury by allowing the acts to continue during trial than the defendant will suffer by enjoining them at once, the preliminary injunction will be issued.[21]

50. **Same subject—Decree—As to balancing of injuries.**—Some American courts have been persuaded to apply the same process of balancing the respective injuries to the parties in deciding whether a final injunction shall be granted against a proved

[20] Eaden v. Firth, 1 Hen. & M. 573 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 564; Herbert v. Pennsylvania Co., 43 N. J. Eq. 21, 10 Atl. 872, 1 Keener, Equity Jurisdiction Cases, p. 860.

[21] Pollock v. Lester, 11 Hare 266 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 837.

nuisance. Thus, in a Pennsylvania case, the defendant's extensive iron furnaces were located at the foot of a bluff, the plaintiff's dwelling house and small cotton factory on the summit. Soft coal smoke from defendant's chimneys greatly injured plaintiff; but to discontinue the use of soft coal, which was necessary to the successful prosecution of the defendant's business, meant the closing down of his plant. The nuisance to the plaintiff was serious and undoubted; injunction was refused solely on the ground that the defendant's investment was very large compared with the plaintiff's.[22] In a few cases an additional reason appears, in that the interruption of defendant's business would inconvenience the public; as where defendant's waterworks, which created a smoke nuisance to plaintiff, furnished the only reliable means of extinguishing fires in a city.[23] But this idea, that after the plaintiff's rights are clearly proved, the injuries may still be balanced and a decree refused, has been emphatically rejected by the English and a majority of the American courts. Enjoining a proved nuisance, destructive of the enjoyment of plaintiff's estate, is not a matter of discretion, but of strict right.[24] It is the only mode in which the plaintiff can be effectually protected in his rights of property. Refusal of an injunction

[22] Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202, 1 Ames, Equity Jurisdiction Cases, p. 574. See, also, Mountain Copper Co. v. United States, 142 Fed. 625, 1 Scott, Cases on Equity, p. 759.

[23] Daniels v. Keokuk Waterworks, 61 Iowa 549, 16 N. W. 705, 1 Ames, Equity Jurisdiction Cases, p. 585.

[24] Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames, Equity Jurisdiction Cases, 578, 1 Keener, Equity Jurisdiction Cases, p. 806, 1 Scott, Cases on Equity, p. 752, LEADING ILLUSTRATIVE CASES.

amounts to a license to appropriate one's neighbor's land for one's private use, on payment of such damages as a jury may from time to time award. "The necessities of one man's business cannot be the standard of another man's rights."[25] The fact that defendant's business is a public benefit may be a proper argument to call for legislation giving him the power of eminent domain, but is not a consideration which should induce the courts to dispense with such legislation, to the sacrifice of rights of private property.[26]

51. **Same subject—Laches—Form of decree.**—That the right to an injunction against a nuisance is not a matter of favor or discretion is also illustrated by the rule that plaintiff does not lose his remedy by mere laches or delay, unless, indeed, he waits so long that his legal right is also lost and the defendant acquires a right by prescription to commit the nuisance.[27] Where the circumstances require, a mandatory injunction ordering the defendant to remove his structures which cause the nuisance, is as much a matter of course as an ordinary preventive injunction.[28] As in cases of waste, the decree should include damages for the past injury.[29]

[25] Chestatee Pyrites Co. v. Cavenders, etc. Co., 118 Ga. 255, 45 S. E. 267, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174. See cases collected, 1 Pomeroy, Equitable Remedies, § 530, note 115.

[26] Shelfer v. London El. L. Co., (1895) 1 Ch. 287 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 589.

[27] Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, Equity Jurisdiction Cases, p. 600, 1 Keener, Equity Jurisdiction Cases, 822.

[28] Corning v. Troy, etc. Factory, 40 N. Y. 191, 1 Keener, Equity Jurisdiction Cases, p. 814.

[29] Pomeroy, Equity Jurisprudence, § 237.

52. **Public nuisance.**—A public nuisance may be enjoined at the suit of the attorney-general or other officer representing the state or municipality;[30] but will not be enjoined at the suit of a private person, unless he shows that it causes him some special injury in addition to that which he suffers as a member of the community.[31]

53. **Infringement of patent rights.**—Suits for infringement of patent rights are almost always in equity. Injunction lies on the ground of avoiding a multiplicity of suits, since the infringement is in its nature a continuous act. The suit involves two questions—whether the plaintiff's patent is a valid one, and whether it is infringed or copied by the defendant's machine or process. These are apt to be complicated questions, demanding much technical evidence, and hence are usually tried by the court without the aid of a jury. Says a distinguished federal judge: "When one remembers the careful study of intricate machinery, the manipulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the case of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the

[30] Attorney-General v. Williams, 174 Mass. 476, 55 N. E. 77, 1 Ames, Equity Jurisdiction Cases, p. 619; State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809, 1 Scott, Cases on Equity, p. 731.

[31] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1349.

appearance of a logical train of reasoning in its support, it seems safe to say, a priori, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with naught but their vague recollections of the evidence, would be a lottery."[32]

54. **Same subject—Preliminary injunction.**—Since a preliminary injunction in a patent suit is apt to mean putting a stop to defendant's business, the court requires a strong case to warrant an injunction in advance of trial. The plaintiff must prove the infringement, of course, and he must prove that his own patent is valid. The fact that letters patent were issued to him by the patent office does not raise a strong enough presumption of validity; he must also show that the public has acquiesced in his claim; or else that in a prior suit against other parties his patent has been adjudged to be valid. Even this prior adjudication is not absolutely conclusive; for the defendant in the present suit may introduce new evidence which will show that the prior decision in the plaintiff's favor was wrong, or that the prior litigation was collusive—a sham, not a real contest.[33]

55. **Same subject—Complete relief.**—As in cases of waste and nuisance, the plaintiff in the injunction suit may also have in addition to the injunction, pecuniary relief, under the general principle that jurisdiction acquired for one purpose will be re-

[32] Lacombe, Cir. J. in the case of Wyckoff v. Wagner Typewriter Co., 88 Fed. 515.

[33] Edison Electric Co. v. Beacon, etc. Co., 54 Fed. 678, 1 Ames, Equity Jurisdiction Cases, p. 630; Standard Elevator Co. v. Crane El. Co., 56 Fed. 718, 6 C. C. A. 100, 1 Ames, Equity Jurisdiction Cases, p. 663.

tained for the purpose of awarding complete relief.[34] This relief generally takes the form of an account of profits made by the defendant. "Profits are the gains or savings made by the wrong-doer by the invasion of the complainant's property-right in his patent. They are the direct pecuniary benefits received, and are capable of direct measurement."[35] But a bill in equity does not lie for a mere account of profits for a past infringement; the accounting is incidental to the injunction suit.[36] If, however, the plaintiff is properly in court, suing for an injunction and an accounting, and the patent expires during the suit, the suit is not necessarily at an end,[37] but may be retained for an accounting. Similarly, where the injunction fails by the death of the defendant pending suit, an accounting of profits may be had against his estate.[38]

56. **Copyrights and literary property.**—Injunction against infringement of copyrights is governed by very much the same rules as injunction against infringement of patents. The plaintiff need not show that he was actually damaged by the piracy.[39] A decree for permanent injunction may include an account of defendant's profits.[40] If the plaintiff's book or play is immoral, the maxim, "He who comes into equity must come with clean hands" applies,

[34] See § 230.

[35] Head v. Porter, 70 Fed. 498, 1 Ames, Equity Jurisdiction Cases, p. 644.

[36] Root v. Lake Shore & M. S. R. Co., 105 U. S. 189, 26 L. Ed. 975.

[37] Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392.

[38] Head v. Porter, 70 Fed. 498, 1 Ames, Equity Jurisdiction Cases, p. 644.

[39] Reed v. Holliday, 19 Fed. 325.

[40] Baily v. Taylor, 1 Russ. & M. 73 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 654.

and the court will refuse to protect his rights from infringement.[41]

Apart from any copyright statutes, the author of an unpublished literary work has the right to restrain by injunction the piracy of the result of his intellectual labor. This right extends to the unauthorized publication of an unpublished manuscript,[42] or of lectures which have been delivered but not published;[43] the performance of an unpublished play;[44] and the unauthorized publication of private letters, whether they have or have not any value as literary productions.[45] An artist also may prevent the making of copies of his paintings or other works of art.[46]

57. **Trademarks—Unfair competition.**—A, the owner of a trademark, suffers damage by its unauthorized use on the goods of a rival, B, so that persons are deluded into buying B's goods under the belief that they are the goods of A; the amount of custom which A loses by this fraudulent competition is, obviously, a difficult thing to estimate, so that A's right to an injunction is undoubted.[47] The jurisdiction in recent years has been extended far beyond the protection of technical trademarks. Thus, the

[41] Martinetti v. Maguire, 1 Deady 216 (U. S.); Egbert v. Greenberg, 100 Fed. 447 ("official form chart of races" not an immoral publication).

[42] Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480.

[43] Nicols v. Pitman, L. R. 26 Ch. D. 374 (Eng.).

[44] Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480.

[45] Gee v. Pritchard, 2 Swans. 402 (Eng.), 1 Scott, Cases on Equity, p. 149, 1 Keener, Equity Jurisdiction Cases, p. 59.

[46] Prince Albert v. Strange, 1 Mac. & G. 25 (Eng.), 1 Hall & T. 1, 2 De G. & S. 652.

[47] National Biscuit Co. v. Baker, 95 Fed. 135; Vacuum Oil Co. v. Climax Refining Co., 120 Fed. 254 (when descriptive words are not a valid trademark).

use of a trade name so similar to that of another as to deceive the public will be enjoined. Cases have even arisen where, on special facts, a man has been prohibited from using his own name in business,[48] or required to use every reasonable means to distinguish his goods from those of a competitor who was in the business before him.[49] Further, imitation of the color, form or style of the packages, labels, etc., used by the plaintiff, in such a way as to deceive the public and injure the plaintiff's business, will be enjoined.[50] The maxim, "He who comes into equity must come with clean hands" applies with great force to all these cases. Consequently, the plaintiff will lose his right to a writ of injunction if in his trademark, trade name, or advertisements he has been guilty of material false statements regarding his article.[51]

58. **Other torts—Trade libels, strikes, boycotts, etc.**—A publication will not be restrained merely because it is libellous;[52] but the fact that a publication is libellous will not prevent an injunction if there is some other ground for restraining the publication. Thus, where A sent circulars to B's customers, not in good faith but maliciously, threaten-

[48] Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769, 27 L. R. A. 42, 39 N. E. 490.

[49] Royal Baking Powder Co. v. Royal, 122 Fed. 337, 58 C. C. A. 499.

[50] Denison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

[51] Worden & Co. v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282.

[52] Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142, 1 Keener, Equity Jurisdiction Cases, p. 53; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310, 1 Keener, Equity Jurisdiction Cases, p. 51. Modern English cases enjoin such publications; but they depend in part on statute: Quartz Hill, etc. Co. v. Beall, L. R. 20 Ch. D. 501, 507 (Eng.).

ing suits for the alleged infringement by B of A's patent, B obtained a writ of injunction restraining A.[53]

Injunction cases against striking workmen often involve difficult questions of theory in the law of torts: questions as to the propriety of the remedy of injunction are at the present day comparatively rare. It is well settled that actual or threatened violence by strikers to the plaintiff's employees or to persons seeking employment from him is a proper subject for injunction, on the ground that the damage is difficult to estimate, and on the ground of avoiding multiplicity of suits.[54] The chief criticism of the equity courts in these cases has been, that the acts involved are frequently crimes, and should be left to be punished by the criminal courts, instead of by the equity courts, without a jury, through the summary process of contempt. The general principle is well settled, however, that equity will not refuse to protect a property right by appropriate remedies on the ground that the threatened infraction of that right is also a violation of the criminal law:[55] while, conversely, it will not interfere to restrain a criminal act where no right of property is involved.[56]

[53] Emack v. Kane, 34 Fed. 46; see, also, Casey v. Cincinnati Typographical Union, 45 Fed. 135, 12 L. R. A. 193 (boycotting circular); 2 Pomeroy, Equitable Remedies, § 630.

[54] Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551 (Eng.), 1 Scott, Cases on Equity, p. 763; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722, H. & B. 773; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230, 1 Scott, Cases on Equity, p. 768.

[55] In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 34 L. Ed. 1092.

[56] Cope v. District Fair Association, 99 Ill. 489, 39 Am. Rep. 30, 1 Ames, Equity Jurisdiction Cases, p. 29.

59. **Injunction against state and municipal officers.**—The law on these subjects is treated elsewhere; but a few points may be noted. Equity has no jurisdiction to control elections to office.[57] The legal remedies are, in general, adequate to test the right to hold a public office.[58] The unlawful acts of public officers may, however, be restrained, where they would produce irreparable injury, or create a cloud upon title, or involve a multiplicity of suits.[59] Political acts of public officers will not be restrained.[60]

A very common form of suit is that brought to restrain the enforcement of illegal ordinances, or other illegal or fraudulent acts by municipal officers. The suit is usually brought by one or more taxpayers suing as representatives of the whole body of taxpayers; and the ground of jurisdiction is, that the illegal act, being a diversion of the funds of the municipality to improper uses, will ultimately result in increasing the burden of taxation.[61] Acts frequently enjoined are, the issuing of municipal bonds for purposes unauthorized by law;[62] incurring municipal indebtedness in excess of the limit prescribed by the state constitution;[63] disregard of laws which

[57] Fletcher v. Tuttle, 151 Ill. 41, 42 Am. St. Rep. 220, 25 L. R. A. 143, 37 N. E. 683.

[58] Arnold v. Henry, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089.

[59] People v. Canal Board, 55 N. Y. 390, 1 Keener, Equity Jurisdiction Cases, p. 100.

[60] State of Georgia v. Stanton, 6 Wall. 50 (U. S.), 18 L. Ed. 721.

[61] Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070; Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180, 1 Pomeroy, Equitable Remedies, § 345.

[62] Newmeyer v. Missouri & M. R. Co., 52 Mo. 81, 14 Am. Rep. 394.

[63] Honaker v. Board of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413.

require contracts to be let to the lowest responsible bidder.[64]

60. **Injunction against taxation.**—Illegal taxation is a very common subject for injunctive relief; but the rules on the subject vary so greatly from state to state that few generalizations are possible. If the tax is a lien on real estate, and the tax proceedings are not invalid upon their face, the title is clouded and relief may often be had on this ground.[65] If the defect or illegality in the tax is one which concerns the whole community so that each tax-payer has the same cause of complaint, then, according to the rule in many states, equity may take jurisdiction for the purpose of avoiding multiplicity of suits.[66] In perhaps the majority of states, a defect or illegality in a personal property tax, affecting one person only, is rarely the subject of an injunction; since if his chattels are seized for non-payment of the illegal tax, trespass or trover lies against the officers making the seizure.[67]

61. **Injunction against exercise of eminent domain power.**—Constitutions of all states as well as of the United States, contain the provision that "property shall not be taken for public use without just compensation." A violation of this constitutional guaranty by agencies—e. g., railroads—which are vested by the legislature with the power of eminent domain[68] is a wrong of such a serious nature,

[64] Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

[65] See § 87.

[66] See § 85.

[67] Shelton v. Platt, 139 U. S. 595, 11 Sup. Ct. 646, 35 L. Ed. 273.

[68] For definition of eminent domain, see article on EMINENT DOMAIN.

and the eminent domain power is so liable to abuse, that courts of equity freely enjoin such violation, without inquiring whether the legal remedy of damages is adequate.[69] Questions of considerable difficulty have arisen where a railroad, other than a street railway, is authorized to occupy a street, and by its operation causes damage to the owners of adjoining property. It is generally agreed that if the ownership of the street is vested in the abutting owner, while the public merely has an easement in the street, such owner may enjoin the use of the street by the railroad until compensation is ascertained or paid.[70] In cases, however, where the ownership of the street is in the public and not in the abutting owner, there is a sharp conflict of authority as to whether injunction will lie,[71] or the owner will be confined to his action at law for damages.[72]

62. **Injunction in aid of other equitable remedies.** —The foregoing paragraphs,[73] together with those relating to enjoining breach of contracts,[74] enumerate the more conspicuous instances in which an injunction may take the place of the legal remedy. In addition, the instances are numberless where an

[69] East & West R. Co. of Alabama v. E. T. V. & G. R. Co., 75 Ala. 275; Lewis, Eminent Domain, § 632; Pomeroy, 1 Equitable Remedies, § 465.

[70] Williams v. New York C. R. Co., 16 N. Y. 97, 69 Am. Dec. 651, 1 Ames, Equity Jurisdiction Cases, p. 521, 1 Scott, Cases on Equity, p. 706.

[71] See the great series of elevated railroad cases in New York, beginning with Story v. N. Y. etc. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; including Galway v. Metropolitan Elevated R. Co., 128 N. Y. 145, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, Equity Jurisdiction Cases, p. 601, 1 Keener, Equity Jurisdiction Cases, p. 822.

[72] Stetson v. Chicago & E. R. Co., 75 Ill. 74, 1 Ames, Equity Jurisdiction Cases, p. 595.

[73] §§ 41 to 61.

[74] §§ 16, 34, 35.

injunction may be used in connection with other equitable remedies. It may be said that an injunction will be granted in aid of an equitable remedy whenever it is needed to render that remedy effectual.[75] Thus, if the suit is for cancellation—i. e., to compel a written instrument or contract obtained by fraud to be delivered up for the purpose of being cancelled or destroyed—an injunction may be granted to prevent the transfer of the instrument pending suit.[76] A beneficiary may restrain a threatened breach of trust by his trustee, as well as call him to account when the breach has been committed.[77] In general, whenever the litigation in equity concerns specific property—as is usually the case in equity suits—an injunction will be granted, if needed, restraining the defendant from transferring or encumbering the property until the rights of the plaintiff are determined.[78]

63. **Injunctions against actions and judgments at law—Equitable defenses.**—Suppose that A has made an oral contract to purchase land from B, has gone into possession and paid the price. Under the equity doctrine of part performance, as we have seen,[79] A has an "equity" for specific performance. B now brings ejectment against A. The court of law knows nothing about the doctrine of part performance, and therefore must give judgment for B. Must A submit to being turned out of possession, notwithstand-

[75] 4 Pomeroy, Equity Jurisprudence, § 1339.
[76] See § 65.
[77] Drake v. Wild, 65 Vt. 611, 27 Atl. 427.
[78] 4 Pomeroy, Equity Jurisprudence, § 1340.
[79] See § 29.

ing that the equity court will, in a proper suit, clothe him with the legal title? The court of chancery is not a higher court than that of common law—and cannot reverse its judgment. Situations like this gave rise to many conflicts of jurisdiction between the two courts in early days, which were finally settled about three centuries ago. The machinery adopted is this: the chancery court fully recognizes, and does not attempt to interfere with, the jurisdiction of the common law court. Therefore, chancery addresses its injunction to the litigant party, B, and orders him to desist from his action at law, until A has had a chance to establish his equitable right in the court of chancery; or if B's suit has proceeded to judgment, it prohibits B from making any use of his judgment. In this somewhat roundabout way a defendant in an action at law is enabled to take advantage of any equitable defense that he may have. In the code states, i. e., those states which,[80] following the example of New York, have effected a partial blending of law and equity, the defendant is allowed to set up in the action at law any defenses, whether legal or equitable, thus saving the expense and trouble of two suits. Injunction for the purpose of setting up equitable defenses, therefore, is nearly obsolete in those states.[81]

64. **Same subject—Judgments obtained by fraud or accident.**—A defendant may have a good legal defense to the action at law, and yet, without any fault or negligence on the part of himself or his at-

[80] See § 34.

[81] 4 Pomeroy, Equity Jurisprudence, §§ 1366 and following.

torney, may be prevented from setting it up. Thus, he may rely on the fraudulent promise of the plaintiff that the case against him will not be pressed, or brought to trial, and so suffer judgment by default. The party who obtains a judgment in this or any other way by fraud will be enjoined from making use of his judgment.[82] Unavoidable accident is another ground for relief against judgments: as where the defendant's attorney was prevented from attending the trial by a sudden flood.[83] These are merely examples from a long list of instances in which it is deemed unconscientious for the plaintiff at law to take the benefit of his judgment.[84] In many of these cases modern statutes give the defendant legal relief by motion for a new trial; but the jurisdiction of equity still remains.

There is, however, one important and striking exception. Where the plaintiff at law has obtained his judgment by perjured testimony, it might be supposed that a court of conscience would be ready and eager to give relief against the judgment. But other considerations here come into play. The credibility of the plaintiff's witnesses was one of the things to be determined in the first suit. Moreover, to admit perjury as a ground for a new trial would lead, it is thought, to endless litigation of the same issues. It is human nature for a defeated litigant to believe that he lost his case by the perjury of his opponent.

[82] Merriman v. Walton, 105 Cal. 403, 45 Am. St. Rep. 50, 30 L. R. A. 786, 38 Pac. 1108.

[83] Ford v. Ford, 1 Miss. 505, 12 Am. Dec. 587. For further examples, see 2 Pomeroy, Equitable Remedies, § 658.

[84] 2 Pomeroy, Equitable Remedies, §§ 647-669.

For these reasons of policy, the majority of the courts refuse to enjoin a judgment on the ground of perjury alone.[85]

[85] United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; 2 Pomeroy, Equitable Remedies, § 656.

CHAPTER IV.

CANCELLATION—REFORMATION—RESCISSION.

65. **Cancellation of instruments.**—This is a remedy by which an invalid written instrument is ordered to be delivered up to be destroyed or cancelled. As alternative or additional relief, the holder of the instrument may be enjoined from bringing suit upon it. Deferring for future consideration cases where the instrument creates a cloud upon title to land,[86] the question in each case usually is, Will complainant have an adequate remedy by defending such action at law as the holder of the instrument may bring? If the defense is one of which courts of equity alone take cognizance, he, of course, has no remedy at law, and cancellation will lie. If the defense is a legal one, and appears upon the face of the instrument—for example, if the instrument is a contract reciting an illegal consideration,—then the complainant is in no real danger from a future suit upon the instrument; his defense at law is simple and complete.[87]

Suppose the instrument to which there is a valid defense, not apparent on its face, is negotiable. B obtains from A, by fraud, A's promissory note, payable July 1st. In B's suit against A on the note, A may successfully set up the defense. But it is the

[86] See §§ 87-89.

[87] Simpson v. Lord Howden, 3 My. & Cr. 97 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 124.

peculiarity of negotiable paper, that if B, before July 1st, transfers the note to C, a bona fide purchaser for value, C will take it free from the defense; in C's suit on the note, A may not set up the defense that would have availed against B. A, therefore, needs, and may obtain not only a writ of injunction against B's transferring the note, but also on proof of its invalidity, a surrender of the note for cancellation.[88]

66. **Same subject.**—Suppose, however, an ordinary written contract is subject to some legal defense, such as fraud, not apparent upon its face. B obtains an insurance policy from the insurer, A, by material false representations. A's proof of the fraud depends upon the oral testimony of witnesses who, years hence, when A sees fit to bring suit upon the policy, may be scattered, or may be dead, or may have forgotten all about the transaction. Unless B, by a suit to cancel the instrument, can litigate its validity now, he may at some future time be subjected to an unjust recovery on account of the loss of the evidence to prove his defense. Is this a sufficient ground for cancellation? On this question the American cases are in the sharpest conflict.[89] Probably the rule of the majority is that this danger of loss of evidence is not, alone, a sufficient ground for cancellation. This conclusion depends, in part, on the reason that modern statutes provide for the per-

[88] Smith v. Aykwell, 3 Atk. 566 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 132.

[89] Fuller v. Percival, 126 Mass. 381, 2 Ames, Equity Jurisdiction Cases, p. 111, 3 Keener, Equity Jurisdiction Cases, p. 483; Andrews v. Frierson, 134 Ala. 626, 33 South. 6, 1 Scott, Cases on Equity, p. 108.

petuation of the testimony of witnesses to be used on a future trial.[90]

67. **Reformation — Mutual mistake.**—Reformation is an equitable remedy by which a written agreement is corrected so as to express what the parties intended it to express. A contracts to convey to B, a tract of land, Whiteacre. By mistake, not noticed by either A or B, the land conveyed is so described in the deed that Blackacre is included. The legal title to Blackacre, of course, passes to B on delivery of the deed. The mistake of the parties is *mutual;* that is, each party is ignorant of the same fact, viz., that Blackacre is included in the conveyance. B holds the legal title to Blackacre, under the deed, impressed with an equity in A's favor. In this particular instance, something more than a correction of the instrument is needed: B must be ordered to reconvey Blackacre to A. In many states, however, under modern statutes,[91] the decree of reformation will have the effect of a conveyance.

Reformation, then, is appropriate, where by mutual mistake of the parties a written instrument fails to express or effect the real agreement actually made by the parties.[92]

68. **Same subject—Mistake of one party, known to the other.**—If B, in the case just put, having contracted for Whiteacre, notices, before he accepts the conveyance, that Blackacre is included in the deed,

[90] Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202, 3 Keener, Equity Jurisdiction Cases, p. 485; Allerton v. Belden, 49 N. Y. 373, 2 Ames, Equity Jurisdiction Cases, p. 113; Insurance Co. v. Bailey, 13 Wall. 616 (U. S.), 20 L. Ed. 501, 3 Keener, Equity Jurisdiction Cases, p. 474.

[91] See § 10.

[92] Pomeroy, Equity Jurisprudence, §§ 870, 1376.

his act in accepting the deed is not mistaken, but dishonest and fraudulent. His conduct is at least as blameworthy as if he had accepted the deed in ignorance of the mistake and then resisted A's demand for a reformation. A mistake of one party, known to the other, whereby the instrument does not conform to the agreement, is, therefore, as good a ground for reformation as a mutual mistake.[93]

69. **When there can be no reformation.**—The purpose of reformation, it will be observed, is to make the written expression of the contract conform to the contract. Courts of equity do not undertake to change or make the contracts of parties. Suppose, for example, that A intends to offer Whiteacre to B; B honestly believes that Blackacre is included in the offer, and fixes the price on that supposition; so that there is no true meeting of the minds—no contract. B draws up the deed, including Blackacre, and A signs and delivers the deed without observing that by its terms Blackacre passes. Here is a double mistake, to be sure—a mistake by A as to the contents of the deed, a mistake by B as to the terms of the contract; but no *mutual* mistake. A cannot have the deed reformed to correspond to his intention, because B made no such contract. The case may be one for rescission, but not for reformation.[94] Take another case: A, a widow, is about to marry B. They wish to settle A's property upon her so

[93] Keister v. Myers, 115 Ind. 312, 17 N. E. 161, 3 Keener, Equity Jurisdiction Cases, p. 314; Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294, 2 Ames, Equity Jurisdiction Cases, p. 197, 3 Keener, Equity Jurisdiction Cases, p. 322, LEADING ILLUSTRATIVE CASES.

[94] Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, 2 Ames, Equity Jurisdiction Cases, p. 188.

that B, after marriage, cannot touch it. A has a large income under a settlement by a former husband. Both A and B believe that the terms of this former settlement are such that it will apply to the second marriage, and therefore refrain from including it in the present settlement. After the marriage and separation of A and B, A, having discovered the mistake, seeks to have the second settlement reformed so as to include the omitted income. Her suit must fail; equity will not make a contract for A and B which they failed to make, merely because, if they had known all these facts at the outset, they would have entered into a different contract.[95]

Again, the instrument may intentionally vary from the contract made. A agreed to give B a warranty deed on the exchange of certain premises. The effect of the warranty deed, of course, would be to make A personally responsible if the premises should turn out to be subject to an incumbrance. Later, A declined to make anything but a quit claim deed, which B accepted. Both parties were ignorant that the premises were incumbered. Held, that B could not have the deed reformed so as to include a warranty. By accepting the quit claim he deliberately varied the contract to his disadvantage, and took the chance of loss.[96]

70. **Rescission—When, for mutual mistake.**—A sold to B a piece of land located on a stream, both

[95] Barrow v. Barrow, 18 Beav. 529 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 199, LEADING ILLUSTRATIVE CASES.

[96] Whittemore v. Farrington, 76 N. Y. 452, 2 Ames, Equity Jurisdiction Cases, p. 208, 3 Keener, Equity Jurisdiction Cases, p. 207, 2 Scott, Cases on Equity, p. 600.

parties being ignorant that the land had been swept away by a flood. B gives A his bond for the price. Since a bond is an instrument under seal the failure of the consideration could not be set up in A's action on the bond. Can B have relief in equity? Here we have a mutual mistake as to the *existence of the subject matter* of the contract; equity will order the contract rescinded, the bond cancelled, and any payment made by B returned.[97]

In the first case put in § 69, the deed was made under the mutual belief that a contract of sale existed, when in reality no contract had been made. The case, therefore, is one for rescission, and cancellation of the deed.[98]

A, having a claim against the government of Spain, contracted to pay B, a lawyer, a percentage of the amount to be recovered, in consideration of B's services in prosecuting the claim. Both parties were ignorant that the claim had been allowed. Here we have rescission, on the ground that the parties were ignorant of a matter which was present in their minds as a material inducement to the contract. The agreement was made on the assumption that the claim had not been allowed.[99]

71. **No rescission for mutual mistake as to value.** —A sold to B a promissory note made by C. Both A and B were unaware at the time that C had gone

[97] Case put in Hitchcock v. Giddings, 4 Price 135 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 192.

[98] Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, 2 Ames, Equity Jurisdiction Cases, p. 188.

[99] Allen v. Hammond, 11 Pet. 63 (U. S.), 9 L. Ed. 633, 2 Scott, Cases on Equity, p. 582.

into bankruptcy, and therefore would be unable to pay his debts in full. B has no right to a rescission of the sale; the mistake was merely as to the value of the article sold, not as to its existence or identity.[1] The policy of the rule is obvious; if a party were permitted to avoid his contracts because of a mistake as to the value of the subject matter, few transactions would stand.

72. **Unilateral mistake—Generally, no rescission or reformation.**—A offers to sell to B for $1,000 a tract of land, so described by metes and bounds as to include both Whiteacre and Blackacre. A intends to sell Whiteacre only, and supposes that the description accurately expresses his intent. B accepts the offer in good faith, in ignorance of A's mistake, and taking the offer to be what it appears to be on its face. May A have any relief? May he have the contract reformed,—e. g., by omitting Blackacre? Obviously not, since that would be to force upon B a contract that B never made. May he have rescission, and so avoid the contract altogether? The contract contains the elements of a good offer and acceptance; to permit rescission because of facts present in the mind of one party only would render the avoidance of contracts too easy a matter. Unilateral mistake, as a general rule, is no ground for rescission or reformation. A, in fact, may not even resist specific performance of the contract made,[2] except

[1] Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708, 2 Ames, Equity Jurisdiction Cases, p. 212.

[2] Tamplin v. James, L. R. 15 Ch. Div. 215 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 388, 2 Keener, Equity Jurisdiction Cases, p. 979, 2 Scott, Cases on Equity, p. 277.

in a few cases where the hardship on A would be very great.[3]

73. **Unilateral mistake, known to other party, in making contract.**—A offers in writing to rent a house to B for $30 a month. A intended his offer to be $50; the wrong figure was inserted by a slip of the pen. B accepts the offer as made, realizing that it was made by mistake. May A have his contract reformed, and force B to take the house at $50? Plainly not, for B never consented to any such terms. Equity will not make a contract for the parties.[4] A, however, may, as we have seen,[5] defend B's suit for specific performance; and there is good authority for holding that A may have the contract rescinded on account of B's fraud in accepting an offer which he knew to be mistaken.[6]

74. **Mistake in gifts.**—Thus far we have been dealing with the mistake of one or both parties to a contract. Mistakes on the part of a donor are governed by a different set of rules. If A intends to make a gift of Blackacre to B, and by mistake includes Whiteacre in the conveyance; or if A intends to make a gift of a life estate to B and by mistake conveys a fee, B, being a mere volunteer, a recipient of A's bounty, has no equity to retain what A did not intend to give. The fact that he may have ex-

[3] Malins v. Freeman, 2 Keen 25 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 383, 2 Keener, Equity Jurisdiction Cases, p. 933, 2 Scott, Cases on Equity, p. 272.

[4] Gun v. McCarthy, 13 L. R. Ir. 304 (Ireland), 2 Ames, Equity Jurisdiction Cases, p. 238. Compare § 68, when the unilateral mistake was in reducing the contract to writing.

[5] See § 21.

[6] Gun v. McCarthy, note 4, above.

pected to receive more than A intended to give does not, in justice, entitle him to take advantage of A's mistake. A, therefore, may have reformation, so as to make the conveyance correspond with his intention; or a reconveyance from B of the excess over what A intended to give.[7]

75. **Same subject.**—Suppose that the situation in the last paragraph is reversed. A, intending to give Whiteacre and Blackacre to B, by mistake conveys Whiteacre; or intending to give B a fee, by mistake conveys only a life estate. May B compel A, against his will, to make a conveyance in accordance with his original intention? It was pointed out that A's mere promise to make a gift to B can not be specifically enforced by B. No more will equity aid a volunteer by compelling reformation of a defective or imperfect gift.[8]

If A is dead, however, and B's suit is against his heirs, the situation is different. B and the heirs are equally volunteers. If B can show that the gift did not carry out A's intention, and there is no reason to suppose that A's intention, up to the time of his death, had changed, so that if B had applied to A in the latter's lifetime the mistake would have been rectified, B's claim to reformation would appear to be stronger than the claim of the heirs to resist it; and such is the better view.[9]

76. **Mistake of law.**—If any proposition can be considered established by innumerable dicta, the

[7] Andrews v. Andrews, 12 Ind. 348, 2 Ames, Equity Jurisdiction Cases, p. 245.

[8] Eaton v. Eaton, 15 Wis. 259, 2 Ames, Equity Jurisdiction Cases, p. 244.

[9] MacMechan v. Warburton, L. R. Ir. 1 Ch. D. 435.

rule that mistake of law cannot be relieved against would seem to be so established. But on examination we find that well established exceptions to the rule cover nearly as much ground as the rule itself. *Ignorantia juris non excusat,*—"Ignorance of the law is no excuse," is an ancient maxim of the common law. It finds its justification in considerations of policy—the necessity of certainty as to the binding force of contracts, and of the finality in litigation. If a party to a contract or to a law suit were at liberty to avoid his contract or set aside a judgment because of his or his attorney's ignorance of law, great confusion, it is believed, would result.[10] It is therefore settled, with but little dissent, that a mistake of one or both parties as to the legal effect of a contract will not, by itself, be a ground for rescinding the contract in equity;[11] and under the rules as to reformation already stated, it will not be a ground for reforming the contract, since equity does not undertake to make contracts for the parties.[12]

77. **Same subject—Reformation where instrument does not express the contract.**—It is equally well settled that when the parties have made a definite agreement, and in reducing it to writing have employed language the legal significance of which does not express their intention, the contract may be reformed by substituting the proper phraseology.

[10] 2 Pomeroy, Equity Jurisprudence, § 842.

[11] 2 Pomeroy, Equity Jurisprudence, § 843, and cases cited.

[12] Hunt v. Rousmaniere, 8 Wheat. 174 (U. S.), 1 Pet. 1 (U. S.), H. & B. 177, 183, 2 Ames, Equity Jurisdiction Cases, p. 250, 3 Keener, Equity Jurisdiction Cases, p. 6, 2 Scott, Cases on Equity, p. 544.

Thus, in a leading case, the parties to a deed reserved a "dower" interest in the estate conveyed,—a life estate in one third—when it was their intention and agreement to reserve the remainder as well as the life estate; a reconveyance of the remainder was decreed, so that their intention was carried out.[13] The analogy to cases where reformation for mistake of fact is allowed, is plain;[14] so that we may generalize and say that reformation is appropriate when by mistake either of law or fact the instrument does not express the contract actually made.

78. **Same subject—Inequitable conduct of other party.**—Secondly, if the mistake of law of one party is known to and taken advantage of by the other; and in general, if the one party's mistake is accompanied by misrepresentations, breach of confidence, undue influence, or other inequitable conduct on the part of the other, the transaction resulting from the mistake may be rescinded.[15] Here again, the situation is analogous to that of unilateral mistake of fact known to the other party.[16]

79. **Same subject—Mistake as to party's existing rights.**—A party may be perfectly aware of the legal meaning and effect of the contract which he enters into and yet his contract may be the result of a mistake as to his existing rights. Thus, he may con-

[13] Canedy v. Marcy, 13 Gray 373 (Mass.), 2 Ames, Equity Jurisdiction Cases, p. 256, 3 Keener, Equity Jurisdiction Cases, p. 35, 2 Scott, Cases on Equity, p. 552. For further cases, see 2 Pomeroy, Equity Jurisprudence, § 845.

[14] Compare § 67.

[15] Haviland v. Willetts, 141 N. Y. 35, 35 N. E. 958, 2 Ames, Equity Jurisdiction Cases, p. 273, 3 Keener, Equity Jurisdiction Cases, p. 144.

[16] See § 73.

tract to pay a rental for Whiteacre, whereas if he had put the correct legal interpretation upon the instruments which form the chain of title to Whiteacre he would have discovered that he is himself the owner of Whiteacre. There are a number of cases of considerable antiquity which give equitable relief under similar circumstances.[17] These authorities have been followed in England in the last fifty years, and to an increasing extent in this country. It is pointed out that "ownership" is a complex conception; that a mistake as to ownership, though due to a misapprehension or misapplication of rules of law, may, after all, well be viewed as essentially a mistake concerning a fact.[18]

80. **Same subject—Compromises.**—To the last rule there is a clearly marked exception. If the parties, with equal opportunities of ascertaining their rights, enter into a contract which is intended as a compromise of their rights, this compromise will not be set aside because of mistake. Each party deliberately takes a chance that he may be mistaken, and that chance enters into his computations in fixing the terms of the compromise. The present rule assumes that the parties deal upon an equal basis;

[17] Turner v. Turner, 2 Ch. Rep. 154 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 263; Bingham v. Bingham, 1 Ves. Sr. 126 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 264, 3 Keener, Equity Jurisdiction Cases, p. 5, 2 Scott, Cases on Equity, p. 543; Pusey v. Desbouvrie, 3 P. Wms. 315, 320 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 2, 1 Scott, Cases on Equity, p. 430.

[18] 2 Pomeroy, Equity Jurisprudence, § 849; Cooper v. Phibbs, L. R. 2 H. L. 149 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 266, 3 Keener, Equity Jurisdiction Cases, p. 43, 2 Scott, Cases on Equity, p. 559; Blakeman v. Blakeman, 39 Conn. 320, 3 Keener, Equity Jurisdiction Cases, p. 42, 2 Scott, Cases on Equity, p. 569; Renard v. Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458, H. & B. 212, LEADING ILLUSTRATIVE CASES.

if the compromise is brought about by misrepresentation, concealment, breach of confidence reposed, or other inequitable conduct, it may be set aside.[19]

81. **Same subject—Mistake of law in gifts.**—A intends to make a gift of a life estate in land to B, and remainder to B's children. By a very common mistake in legal phraseology, language in the conveyance which the layman would suppose to express this intent clearly, has the legal effect of vesting the whole estate in B. If the mistake by which this result is reached had been one of fact, either A or B's children, as we have seen, might have the deed reformed.[20] Where A's mistake is one of law, there appears to be no reason in natural justice or in policy, why B, a mere recipient of A's bounty, should be allowed to profit by A's mistake, and defeat his plain intention. The better rule appears to be, therefore, that a mistake of law in a gift stands on the same ground, as respects reformation, as a mistake of fact.[21]

[19] 2 Pomeroy, Equity Jurisprudence, § 850; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377, 2 Ames, Equity Jurisdiction Cases, p. 288, 3 Keener, Equity Jurisdiction Cases, p. 99.

[20] See § § 74, 75.

[21] Wyche v. Greene, 16 Ga. 49, 2 Ames, Equity Jurisdiction Cases, p. 289; *contra*, Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 2 Ames, Equity Jurisdiction Cases, p. 293, 3 Keener, Equity Jurisdiction Cases, p. 100, 2 Scott, Cases on Equity, p. 555.

CHAPTER V.

BILLS OF PEACE—CLOUD ON TITLE—PARTITION.

82. **Bills of peace—Jurisdiction to avoid a multiplicity of suits.**—We have seen, in discussing the subject of injunction against trespass and nuisance, that a frequent ground of equity jurisdiction is the desire to avoid a multiplicity of suits,—viz.: repeated actions at law by plaintiff against the same defendant.[22] To avoid the vexation and expense of the numerous suits, equity orders the defendant to discontinue the acts which will give rise to the suits. We now have to consider the situation when the numerous similar suits at law are occasioned by the fact that there are numerous parties. First, take the case where a person would be compelled to become plaintiff or defendant in actions at law between himself and numerous other persons, each action involving precisely the same question.

Suppose, for example, that numerous persons, P, Q, R, S, T, etc., have recovered judgments against B, and each levies execution on A's personal property on the claim that it really belongs to B. Now, as we have seen, the remedy of A at law against any one of these persons, as P, for his trespass on A's personal property, is considered adequate.[23] A, at law, on proving his title to the property, may

[22] See §§ 43, 47.
[23] See § 46.

recover either the chattel or damages for its detention or conversion. But A's success in his suit against P will not aid him in his suit against Q, R, S, and the others; since a judgment in a suit to which Q was not a party is not binding on Q. A, therefore, in these different suits has to prove one and only one thing, viz.: his title to the property levied on. It would be a great advantage to A, and no detriment to the others, if this question of A's title could be settled once and for all. The common law, under its rule as to joinder of parties, is unable to do this. Equity, therefore, takes jurisdiction, enjoins proceedings under the executions temporarily, tries in one issue the question whether the property levied upon belongs to A or to B; and if it is found to belong to A, makes the injunction permanent against P, Q, etc.; or if it is found to belong to B, after all, dissolves the temporary injunction and allows the executions to go on.[24]

83. **Same subject—Other illustrations.**—Plaintiff claimed a right to overflow by means of its dam the lands belonging to numerous defendants. Each defendant was suing or threatening to sue the plaintiff at law for damages. To each of these suits the plaintiff had the same defense, viz.: a right to maintain the dam under a dedication by defendants' predecessor in title. If the dispute had been between the plaintiff and a single land-owner, there would be no ground for equity jurisdiction, since the validity of the defense could then be perfectly

[24] Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496; Pollock v. Okolona Sav. Inst., 61 Miss. 293.

well determined in a single action for damages. But to save the plaintiff the vexation of setting up the same defense to numerous suits, equity takes jurisdiction of the question, enjoins the numerous suits, and determines once for all whether or not the plaintiff's claim is valid.[25] Similarly, trespasses by numerous defendants may sometimes be enjoined, in cases where there is a common question between the plaintiff and each trespasser, though the trespass of any one defendant, considered by itself is not of a serious enough character to warrant an injunction.[26]

Sometimes the principle of avoiding a multiplicity of suits gives rise to a remedy other than injunction. Thus, as has been noted, in many states a party cannot have a non-negotiable instrument, to which he has a legal defense, cancelled, but must await a suit at law upon the instrument. But, suppose the officers of a city or other corporation have issued bonds, which have come into the hands of several hundred persons, and the corporation claims to have the defense that the bonds were issued without proper authority; this defense may be established by a single suit for cancellation of the bonds.[27] In an early case, a suit in equity was maintained for the recovery of certain slaves in which plaintiff claimed an interest as remainder-man. The slaves were in possession of numerous parties. To avoid separate actions at law against these parties, the

[25] City of Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83.

[26] Smith v. Bivens, 56 Fed. 352, 2 Ames, Equity Jurisdiction Cases, p. 62.

[27] Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Louisville, N. A. & C. R. Co. v. Ohio Val., etc., Co., 57 Fed. 42.

single bill in equity was entertained to establish the plaintiff's right.[28]

84. **Same subject—Numerous plaintiffs.**—On principle, and the weight of authority, jurisdiction may also be taken in equity where numerous persons would have a cause of action at law, involving the same question, against a single defendant. Thus, certain commissioners were about to open a channel to the sea from a pond in which the numerous plaintiffs held fishing rights. If but one person were injured by the act of the defendants, the damages would not be serious enough to warrant an injunction; but to avoid numerous suits for damages by the plaintiffs, an injunction against the defendant's acts was awarded.[29] The city of Chicago passed an ordinance, alleged to be invalid, imposing a license fee on all vehicles, including bicycles. To avoid arrest and prosecution, each owner must pay the fee, and then bring suit to recover it back; such suits would be very numerous. To avoid this enormous mass of litigation, equity enjoins the enforcement of the ordinance and passes on the question of its validity at the suit of a group of owners who acted as representatives of the rest.[30]

85. **Same subject—Further illustrations.**—A tax is often wholly invalid—void as to every tax-payer; for example, where the tax assessors unlawfully omit a large amount of property, thereby raising the tax

[28] Vann v. Hargett, 22 N. C. 31, 32 Am. Dec. 689. For pecuniary relief against numerous defendants, see Bailey v. Tillinghast, 99 Fed. 801.

[29] Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames, Equity Jurisdiction Cases, p. 64.

[30] City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 2 Ames, Equity Jurisdiction Cases, p. 92.

rate. Each tax-payer has his legal remedy, by paying the tax under protest and then suing to recover it back. To avoid the inconvenience of this multiplicity of suits, many states allow a representative tax-payer to bring an injunction suit to test the validity of the tax.[31] In other states it is not considered sound policy to interfere with the collection of the public revenues by injunction on this ground.[32] The A. Co. issued certificates to seventy-nine different persons; it was the duty of B to pass upon and approve the securities deposited by the A. Co. with B for securing the payment of the certificates. B neglected his duty and accepted securities that were nearly worthless. A. Co. became insolvent. The sole question between the seventy-nine certificate holders and B was whether B was negligent. They were, therefore, allowed to unite in a suit in equity to establish B's negligence and recover damages from B, instead of bringing seventy-nine separate suits at law.[33]

86. **Same subject—Limitation on the principle.**—Contrast the last case with that where a number of persons are injured in a railroad accident. May they join in a bill in equity to recover damages for the mere reason that each plaintiff's claim presents the common question of the railroad's negligence? On the authorities, the answer must be in the nega-

[31] Greedup v. Franklin County, 30 Ark. 101; McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames, Equity Jurisdiction Cases, p. 71; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep 94.

[32] Dodd v. Hartford, 25 Conn. 232, 2 Ames, Equity Jurisdiction Cases, p. 69.

[33] Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, 2 Ames, Equity Jurisdiction Cases, p. 79. LEADING ILLUSTRATIVE CASES.

tive. The common question is not necessarily the only question in each suit. Against A, the company may have the defense that he was guilty of contributory negligence; against B, that he was riding on a pass. Each suit, moreover, presents a distinct issue as to the amount of damages, which will vary greatly with each plaintiff, and must be estimated by a jury; while in the case in the last paragraph there is no issue as to damages; but, on proof of the defendant's negligence the amount of damages to each plaintiff was a mere matter of arithmetical computation. Jurisdiction will not be taken to avoid a multiplicity of suits where the multiplicity cannot be avoided; where, after joining all the parties in a comprehensive bill in equity, there still remain separate issues to be tried.[34]

Thus, the plaintiff brought his bill to cancel numerous notes purporting to be made by him and claimed by him to be forgeries; the notes being in the hands of several defendants. Obviously, proof that note A was forged does not establish that note B is forged. There is a distinct and separate issue of fact as to the forgery of each note; and these issues must remain distinct and separate, though they be all included in one bill in equity. Equity, therefore, by taking jurisdiction would not avoid in substance a multiplicity of suits; therefore it declined jurisdiction.[35]

[34] See cases cited in 1 Pomeroy, Equity Jurisprudence (3d ed.), § 251½.

[35] Scott v. McFarland, 70 Fed. 280: see, also, Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 250-54; Tompkins v. Craig, 93 Fed. 885, 2 Ames, Equity Jurisdiction Cases, p. 87.

This is hardly the place to discuss the minority cases which deny the

87. **Cloud on title.**—A cloud on title is a written instrument which may be used vexatiously or injuriously against the owner of land, or may cast suspicion upon the validity of his title so as to render his land unsaleable at its full value. Thus, suppose A has good title to Blackacre by adverse possession. B holds a deed made to him by C, who was formerly the undisputed owner of the land. To any ejectment that B may bring against A, the Statute of Limitations and proof of A's adverse possession for a sufficient length of time will be a good defense. A, however, cannot compel B to bring ejectment, and has no legal remedy against B. Meanwhile, so long as B's deed is in existence no one will care to purchase Blackacre for its full value; for as the defense to B's ejectment rests in oral proof of A's possession, such purchaser might have some difficulty, at a future time, in making out his defense satisfactorily. Equity, therefore, permits A to bring suit to remove the cloud upon his title; that is, it requires B to deliver up his deed to be cancelled.[36]

Equity will by injunction prevent the creation of a cloud as freely as it will remove a cloud that has already been created.[37]

88. **Same subject—Plaintiff's possession.**—The principle that the relief will be denied if the plaintiff's remedy at law is adequate has its application to this remedy. If the defendant is in possession, the

principle of avoiding multiplicity of suits as an independent ground of equity jurisdiction. See 1 Pomeroy, Equity Jurisprudence (3d ed.), §§ 264-267, and notes.

[36] Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722, 2 Ames, Equity Jurisdiction Cases, p. 140.

[37] See 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1398.

remedy of ejectment is open to the plaintiff; he must, therefore, as a general rule, be in possession in order to bring his bill to remove a cloud.[38] If the land, however, is vacant and unoccupied, it is assumed to be constructively in possession of the true owner; so that the bill will lie.[39] In a few other instances, also, a plaintiff not in possession may maintain the bill, when he is so situated that he cannot eject the party in possession; as, where he is a remainderman.[40]

89. **Same subject—Instrument invalid on its face no cloud.**—The suit to remove a cloud on title is incumbered with one highly technical requirement; the instrument must not be invalid on its face. If its invalidity appears from a study of the instrument itself—though the defect is discoverable only by the exercise of great legal skill and learning—it is assumed that the purchaser from the owner will not be deterred from buying for a full price by the existence of the instrument uncancelled.

The generally accepted test is this: Would the owner of the property, in an action brought upon the instrument by the holder thereof, be required to offer evidence to defeat a recovery? If he would be, the instrument is a cloud; if not—if such action on the instrument would fall of its own weight—it does not constitute a cloud. Thus, A, the owner of a tract of land, sells and conveys it to B, who records his deed. Later, C, a creditor of A, obtains judgment

[38] Keane v. Kyne, 66 Mo. 216, 2 Ames, Equity Jurisdiction Cases, p. 144.
[39] O'Brien v. Creitz, 10 Kan. 202, 2 Ames, Equity Jurisdiction Cases, p. 146.
[40] Hall v. Hooper, 47 Neb. 111.

and execution against A and a sheriff's deed on execution of the tract which formerly belonged to A. Now, if C were to sue B in ejectment and B were to introduce no evidence in defense, C would recover; since C shows title derived from A by the sheriff's deed. To be sure, B could defeat C's ejectment simply by putting the prior record of his deed from A in evidence. This, however, would be matter in defense—a defense that would not appear in C's complaint and proofs. C's claim, therefore, is not invalid on its face; and hence, by the majority view, is a cloud on B's title, which may be removed at B's suit. If C has not yet obtained execution sale or sheriff's deed, but threatens to do so, his proceedings, which if carried out, would create a cloud, may be enjoined.[41]

This rule that an instrument invalid on its face is not a cloud has been criticized as highly technical and unjust. However plausible the logic which supports the rule, it certainly results in refusal of relief to persons the value of whose property is as a fact seriously damnified by the invalid claims which the courts, in obedience to the rule, are obliged to pronounce technically harmless. In deference to the criticism the rule has been rejected by a few states; in these states the common sense test is applied: Does the invalid claim in fact prejudice the owner in the full enjoyment of his property rights?[42]

[41] Pixley v. Huggins, 15 Cal. 127, 2 Ames, Equity Jurisdiction Cases, p. 153, LEADING ILLUSTRATIVE CASES.

[42] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1399; Day Land & Cattle Co. v. State, 68 Tex. 527, 4 S. W. 865, 1 Keener, Equity Jurisdiction Cases, p. 364.

90. **Statutory suit to quiet title.**—The limitations on the equity jurisdiction have led to the creation by statute in the majority of the states[43] of a new form of action, variously known as the "suit to quiet title" or the "suit for the determination of adverse claims." In about half the states that have adopted this action the plaintiff, as in a suit to remove a cloud, must be in possession; in the others, he may be either in or out of possession. If he is out of possession, so that ejectment would lie, the suit is generally considered legal in its nature, and either party entitled to a jury trial; but if the plaintiff is in possession the suit is equitable. The suit to quiet title, on account of the simplicity of its pleadings and procedure, has in several of the Western states become the usual mode of trying title to land. It is usually held that it will lie though the adverse claim is invalid on its face, and, it seems, even though the claim is a purely oral one, not embodied in a written instrument.[44]

91. **Partition of land.**—Ownership in common or joint ownership of land is attended with a great many inconveniences, so that any system of law needs a legal process by which the land may be divided up among the owners in common and a parcel, proportioned in value to the amount of his interest, assigned to each as absolute owner. The common law remedies for this purpose were restricted in scope and came to be supplanted by the equitable

[43] Viz. in the "Code" states and half a dozen others.

[44] For further description of this important remedy see 2 Pomeroy, Equitable Remedies, §§ 739-743.

remedy.[45] This was largely owing to the comprehensiveness of the equitable rules relating to parties, by which all persons having an estate or interest in the premises, whether owners of a present or of a future interest, might be joined in the suit and bound by the decree.[46] If the plaintiff's legal title was in dispute, however, the equity court did not pretend to decide the question of title, but awaited the decision of a court of law in the plaintiff's favor;[47] but this inconvenience has been remedied in many states by statutes permitting the questions of title to be decided in the one equity suit.[48] In the event that the partition is of equitable estates or interests, the court of equity decides the amount and extent of the interests of the parties and then proceeds to grant partition in one and the same suit.[49]

92. **Where partition is inconvenient—Owelty of partition.**—In general, the plaintiff has an absolute right to partition;[50] the power of the court of equity to adapt its decree to meet the circumstances of the case enabling it to overcome considerable inconveniences in the way of an exact division. Thus, in one case, perhaps extreme, partition was made of a house by building a wall through the middle of it; [51] and the right to the use of water in a flowing stream may be

[45] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1386.

[46] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1387, and cases cited.

[47] Frey v. Willoughby, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463.

[48] Pillow v. Southwest, etc. Co., 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32.

[49] Aspen M. & S. Co. v. Rucker, 28 Fed. 220.

[50] O'Brien v. Mahoney, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493.

[51] Turner v. Morgan, 8 Ves. 143 (Eng.).

partitioned.[52] It often happens, however, that an exact division is unfair. Thus, to take an imaginary case, suppose that a narrow strip of land to be partitioned, worth $1,000, between two co-owners, lies two-fifths on one side of a road and three-fifths on the other side. The road constitutes the only fair and reasonable dividing line. The difficulty is met by alloting the two-fifths parcel, worth $400, to A, and the three-fifths parcel to B, requiring B to pay to A $100, which may be made a charge or lien upon B's parcel. This compensation to make up for the inequality in value of the parcels, is known as "owelty of partition;" it may, in appropriate cases, take the form of a rent charged upon the more valuable parcel, or an easement imposed upon such parcel.[53] Again, one of the co-owners may have made improvements upon the land. It is, obviously, unfair that he should be deprived of the benefit of the money he has thus expended. He will, therefore, be awarded compensation by the other cotenants; or the portion of the premises on which he has made the improvements may be set aside to him.[54]

93. **Same subject—Partition sale.**—The difficulties in the way of an even division of the land often make it desirable that the land be sold and the proceeds divided among the co-owners in proportion to their respective interests. This the court had power

[52] Warren v. Westbrook Mfg. Co., 88 Me. 58, 51 Am. St. Rep. 372, 35 L. R. A. 388, 33 Atl. 665.

[53] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1389; Updike v. Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711.

[54] Ward v. Ward's Heirs, 40 W. Va. 611, 52 Am. St. Rep. 911, and note, 296, L. R. A. 449, 21 N. E. 746.

to do, but—until statutes came to its aid—only when all the parties in interest who were *sui juris* consented to such a sale. A single adult party, therefore, could defeat a sale and compel a partition by actual division of the property, however inconvenient that mode might be.[55] This conservative attitude of the courts has been changed in England, and in the United States generally, by statutes which empower the courts to order a sale, without the consent of some of the parties, whenever it appears that a sale is more advantageous for all concerned than a division.[56]

94. **Partition of personal property.**—The common law afforded no remedy or procedure whatever by which partition of personal property among coowners thereof could be had. This gave rise to an equity jurisdiction for the purpose, unaffected by statute; the mode, as in partition of land, being a division of the chattels in kind, or where that was not practicable, a judicial sale and division of the proceeds. Partition of personal property is free from the impediments arising from a dispute as to the title. Since no action similar to ejectment lies to try the title to personal property, the court of equity is obliged to try the issue of title itself, if that is disputed, as preliminary to decreeing a partition or sale.[57]

[55] 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1390; Codman v. Tinkham, 15 Pick. 364 (Mass.).

[56] Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883, 16 L. R. A. 776.

[57] 4 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1391, 1392; Robinson v. Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417.

CHAPTER VI.

SUITS FOR PECUNIARY RELIEF.

95. **Suits for pecuniary relief.**—The remedies which have been discussed so far, apart from the special remedy of injunction, have to do, for the most part, with confirming the title or enjoyment of land or personal property, or avoiding the danger of a future unjust suit. A very large proportion of equitable remedies, however, result in the recovery of a sum of money—pecuniary relief. Of these, again, the majority consist in proceedings taken against certain property resulting in a judicial sale thereof to satisfy the plaintiff's claim. Foreclosure of mortgages and equitable liens—perhaps the commonest of equitable remedies—is more conveniently treated in connection with those topics.[58] We shall take up here four remedies: Creditors' suits, Exoneration, Contribution, and Accounting.

96. **Creditors' suits.**—Creditors' suits against a living[59] debtor may be brought for three chief purposes. First, for discovery of assets.[60] By compelling the debtor to answer under oath interrogatories as to his property the creditor gains information, not otherwise obtainable, to enable him to sub-

[58] See § 151. For marshalling of securities, see § 159. For subrogation, see §§ 157, 158.

[59] Creditors' suits against the estates of decedents have, to a great extent, been superseded by provisions of the statutes relating to administration of estates. See § 145.

[60] As to discovery, see §§ 115, 116.

ject the property to execution.[61] Second, to reach interests of the debtor not subject to execution at law. The common law, knowing nothing of equitable estates and interests, did not permit them to be taken on execution; in addition, many species of intangible property—such as patent rights and copyrights—were not subject to levy and sale. Equity, by a creditor's suit, enables the creditor, where necessary, to have a judicial sale of such property to satisfy his debt. Statutes in England and America have enlarged the scope of the writ of execution, extending it to equitable and other interests; but the jurisdiction of equity is still important.[62] Third, and most important, to set aside fraudulent conveyances. If A conveys land to B in fraud of A's creditors, the conveyance is utterly void at common law as well as in equity, and the land may be subjected to execution by A's judgment creditor. Practically, however, the creditor's right to levy execution is of little value to him. The purchaser at the execution sale will take the land subject to the cloud created by A's prior conveyance to B. Equity, therefore, takes jurisdiction to remove this cloud before instead of after the judicial sale; declares the conveyance to B void, and by way of complete relief orders a sale of the land to satisfy the debt.[63]

97. **Same subject—When the legal remedy is adequate.**—It is the general rule that equity lends its aid only to creditors who have reduced their claims

[61] Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219.

[62] Ager v. Murray, 105 U. S. 126, 26 L. Ed. 442 (patent right); Cochran v. Cochran, 62 Neb. 450, 87 N. W. 152 (equitable interests).

[63] Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 Atl 1007.

to judgment. To this rule there are some exceptions; as, where the debtor has absconded or removed from the state.[64] How far the creditor must pursue his legal remedy beyond the judgment is a question on which the various jurisdictions greatly differ. When the object of the suit is to reach property not subject to execution at law, it is generally agreed that he must demonstrate the inadequacy of the legal remedy by actual experiment before the court will entertain his bill; that is to say, execution must be issued on his judgment, and the sheriff's return *nulla bona* (no property found) be made; thus furnishing the court with the best possible proof that the legal remedy is inadequate.[65]

98. **Exoneration.**—The relation of principal and surety gives rise to several equitable remedies.[66] Where the surety has paid the principal's debt, either voluntarily or by compulsion, or any part of the debt, he has a claim for reimbursement against the principal. This claim is usually enforceable by action at law, but a suit in equity is sometimes resorted to.[67] The term exoneration is more properly applied, perhaps, to the suit in equity by the surety to compel the principal debtor to pay the debt or obligation to the creditor, and thus relieve the surety of the risk of being compelled to pay. Such suit will lie whether the surety has or has not been sued

[64] Merchants' Nat. Bank v. Paine, 13 R. I. 592, 1 Scott, Cases on Equity, p. 136, LEADING ILLUSTRATIVE CASES.

[65] Minkler v. U. S. Sheep Co., 4 N. Dak. 507, 62 N. W. 594, 33 L. R. A. 546.

[66] Subrogation is more conveniently treated elsewhere, in connection with mortgages. See §§ 157, 158.

[67] Beal v. Brown, 13 Allen 114 (Mass.); Bonney v. Seely, 2 Wend. 481 (N. Y.).

by the creditor; but, of course, the debt must be payable at the time when the suit is brought.[68]

99. **Contribution.**—Suppose that A, B, and C are sureties of X to secure his debt or obligation to Y. Y collects the whole amount, $1,500, from A. A has not only the right of reimbursement against X, but the right to compel B and C each to contribute his proportionate share. This right may be enforced by common law action against B and C for $500, respectively; and in ordinary cases the common law remedy is adequate. The rules of equity as to parties, however, by which all the sureties and the principal may be joined in a single suit, often furnish a considerable advantage in favor of a suit in equity. Thus, if in the case put, it appears that B is insolvent and hence unable to contribute his just proportion, A, by a suit in equity, can compel C to share the burden equally, contributing $750 to A's reimbursement instead of $500.[69]

The principle of contribution extends not only to sureties, but to all who are jointly, or jointly and severally, liable on the same obligation. It is the most striking illustration of the maxim, "Equality is equity."[70] There is, however, no contribution among tort-feasors, as a general thing.[71]

100. **Accounting.**—The ancient common law action of account render, tried without a jury, lay only

[68] Dobie v. Fidelity, etc., Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135.

[69] Bosley v. Taylor, 5 Dana 157 (Ky.), 30 Am. Dec. 677; 2 Pomeroy, Equitable Remedies, § 915.

[70] See also § 228.

[71] Johnson v. Torpy, 35 Neb. 604, 37 Am. St. Rep. 447, 53 N. W. 575.

against certain narrowly limited parties, and was subject to other serious defects; the parties could not be examined on oath, and disputed items could be settled only by issues in court before a jury. Assumpsit for the balance of a long account was an almost impossible remedy, for a dispute as to the correct balance meant that the jury must investigate each item, a task for which they are manifestly unfit.[72] The equitable remedy of accounting, therefore, grew up, subject to none of these objections. Accounting is an incident of a great variety of equitable remedies—such as redemption or foreclosure of mortgages, when the mortgagee is in possession;[73] partition; injunction against the infringement of patents;[74] and is the principal relief in equity between members of a partnership[75] or by creditors against an insolvent partnership; by beneficiaries against trustees[76] or quasi trustees.[77] Where accounting is sought as an independent relief between parties not in a fiduciary relationship, the jurisdictional question arises, Is the remedy at law inadequate? and this is often a question of considerable difficulty.

101. **Same subject—When the legal remedy is inadequate.**—The remedy at law is deemed to be inadequate, and accounting will lie in equity: (1) Where the accounts are mutual; that is, where A

[72] Pomeroy, Equity Jurisprudence, § 1420, and note.
[73] See § 148.
[74] See § 55.
[75] 2 Pomeroy, Equitable Remedies, §§ 937-942.
[76] See §§ 134, 135.
[77] See § 138.

has received and paid on account of B, and B has received and paid on account of A.[78] (2) Where the accounts are extremely complicated.[79] Whether, independently of these grounds, an accounting will lie by a principal against an agent, is a question of much difficulty. If the agent is a confidential one, and accounting is sought of matters exclusively within his knowledge, the case is one for equity;[80] but in the absence of this and the other grounds just mentioned, the suit does not generally lie.[81] The principal is not usually under a duty to account to the agent,[82] but may be if the agent's salary depends on the principal's profits.[83] The ordinary relation of banker and depositor is one of debtor and creditor merely, and so does not require an accounting between them in equity.[84]

[78] Phillips v. Phillips, 9 Hare 471 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 449; Haywood v. Hutchins, 65 N. C. 574, 1 Ames, Equity Jurisdiction Cases, p. 459; Garner v. Reis, 25 Minn. 475, 3 Keener, Equity Jurisdiction Cases, p. 920.

[79] Taff Vale Ry. v. Nixon, 1 H. L. Cas. 111 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 454, 3 Keener, Equity Jurisdiction Cases, p. 888; Pierce v. Equitable Life Assurance Society, 145 Mass. 56, 12 N. E. 858, 3 Keener, Equity Jurisdiction Cases, p. 929; compare Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363.

[80] Mackenzie v. Johnston, 4 Madd. 373 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 444, 3 Keener, Equity Jurisdiction Cases, p. 885; Marvin v. Brooks, 94 N. Y. 71, 3 Keener, Equity Jurisdiction Cases, p. 924.

[81] Moxon v. Bright, L. R. 4 Ch. 292 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 450, 3 Keener, Equity Jurisdiction Cases, p. 918.

[82] Smith v. Leveaux, 2 De G. J. & S. 1 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 913.

[83] Harrington v. Churchward, 6 Jur. N. S. 576 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 457; Alpaugh v. Wood, 45 N. J. Eq. 153, 16 Atl. 676, 3 Keener, Equity Jurisdiction Cases, p. 943.

[84] Foley v. Hill, 2 H. L. Cas. 28 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 446, 3 Keener, Equity Jurisdiction Cases, p. 897.

CHAPTER VII.

PROVISIONAL REMEDIES—THE AUXILIARY JURISDICTION.

102. **Provisional remedies.**—Certain remedies in equity do not result in a final determination of a controversy and award of relief, but are preliminary or provisional. The preliminary injunction has already been illustrated;[85] in addition to this, we have the important remedies of Interpleader and Receivers. To these may be added, the suit for Discovery, and certain other remedies, now nearly or quite obsolete, which relate to the taking of testimony for use in actions at law.

103. **Interpleader.**—X makes A his tenant; later, X has a transaction with Y, which Y claims is an assignment of A's rent; X denies the assignment; both X and Y claim the rent from A. A is in doubt whether he should pay X or Y. He is threatened with two suits for the same demand. Of course, if he defends these suits properly, with full evidence of the transaction between X and Y, there can be only one recovery against him; but if he takes a chance and pays Y, that payment will be no defense to X's suit if X turns out to be the rightful claimant. As respects the rental, A is a mere stakeholder, entirely indifferent whether he should pay X or Y. By force of circumstances he is exposed to the vex-

[85] See §§ 44, 49, 54.

ation and expense of defending two law suits for the same demand.[86] Until comparatively recent years the common law afforded him no relief from his predicament; his only relief was, and in many states still is, by bill of interpleader. Interpleader will lie —subject to certain restrictions which will be explained in the following paragraphs—when a person is exposed to the danger of suit by two or more persons for the same thing, debt, or duty. On such a bill the plaintiff—making oath that he is not in collusion with either claimant—brings into court the article or money which is the subject of the conflicting claims, and on proper pleadings and proofs obtains a decree that the claimants do interplead, and if necessary an injunction to stay their suits against him. After such a decree, he drops out of the case entirely, and the litigation may proceed though he dies during the progress of the litigation between the rival claimants.[87]

104. **Same subject—Same thing—Debt or duty.**— The same thing, debt or duty must be claimed by each defendant in order that interpleader may lie. Thus, suppose X sells A an article, and Y then claims that the article belongs to himself and was not X's to sell. Now, if X were to claim that the sale was invalid for some reason, so that the article must be returned to him, and Y also claimed the article itself, obviously the same thing would be demanded; or if X and Y each claimed damages for the conver-

[86] Cowtan v. Williams, 9 Ves. 107 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 8, 1 Keener, Equity Jurisdiction Cases, p. 213.

[87] Anonymous, 1 Vern 351 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 2. See Platte Valley St. Bank v. Nat'l Live Stock Bank, 155 Ill. 250, LEADING ILLUSTRATIVE CASES.

sion of the chattel by A, we would have an instance of the same duty.[88] In the last paragraph we had an example of the same debt—the claim of rental. But suppose X affirms the sale and demands the price, while Y demands damages for the conversion of the chattel. These demands are not legally the same within the meaning of the rule, and interpleader will not lie.[89] Again, the facts frequently present a question whether the plaintiff is not liable to both of the claimants instead of to one; where this question is in doubt, the case is not one for interpleader: as, where an insurance company issued a policy to F, payable on his death to E; without E's consent, the policy was surrendered and a new one issued to F for the benefit of C; there being a doubt upon these facts whether the company was not liable both to E and to C, the company's bill of interpleader was dismissed.[90]

105. **Same subject—Plaintiff a mere stakeholder.** —The plaintiff himself must not claim any interest in the thing or fund in controversy. The interpleader procedure requires that he deposit the thing or fund in court, and be prepared to drop out of the case when the interpleader order is made. His demand for interpleader cannot be mixed up with a claim of his own. Thus, where X and Y each claimed the purchase price of certain merchandise from A, and A demanded interpleader but with a deduction

[88] Pomeroy, Equity Jurisprudence, § 1323, note.

[89] Slaney v. Sidney, 14 M. & W. 800 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 11.

[90] National Life Ins. Co. v. Pingrey, 141 Mass. 411, 2 Ames, Equity Jurisdiction Cases, p. 37, 1 Keener, Equity Jurisdiction Cases, p. 259.

of freight charges which he had paid, relief was refused.[91] So, where plaintiff A, an auctioneer who had sold certain land for X, and received a deposit on the purchase price from Y, the purchaser, was subjected to a demand from Y for return of the deposit on the ground that the sale was void, he could not interplead X and Y with reference to the deposit, and at the same time retain a portion of the deposit as his commissions. If Y's demand to avoid the sale was justified, A, of course, was entitled to no commission whatever from the fund but must look to X for payment.[92]

106. **Same subject—Privity between the claimants.**—The stakeholder's right of interpleader is subject to the highly technical requirement, that the opposing claimants' titles must be in privity with each other—one derived from the other, or both derived from a common source. If Y claims by a title entirely adverse or hostile to X's title, there can be no interpleader. Thus, suppose X deposited an article with A as bailee; Y claims that the article never belonged to X but that his possession and dealing with the article were entirely wrongful and tortious as to Y. A cannot have interpleader.[93] Or, to take the illustration of § 103, suppose Y claimed the rent, not as assignee of X, but by an adverse title—X being devisee of the land under a will and Y the

[91] Baltimore & Ohio R. Co. v. Arthur, 90 N. Y. 234, 2 Ames, Equity Jurisdiction Cases, p. 13, 1 Keener, Equity Jurisdiction Cases, p. 293.

[92] Mitchell v. Hayne, 2 Sim. & St. 63 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 12, 1 Keener, Equity Jurisdiction Cases, p. 292.

[93] First National Bank v. Bininger, 26 N. J. Eq. 345, 2 Ames, Equity Jurisdiction Cases, p. 24.

heir claiming in hostility to the will. Here again, there is no privity between the claimants.[94] The rule is, manifestly, a wholly arbitrary one. The hardship on A is just as great, whether the demands of X and Y are connected or independent; and the machinery of the interpleader procedure will run just as smoothly in either case. The rule, therefore, has been abolished in England by statute;[95] but scarcely any American states have seen fit to change it.[96]

107. **Same subject—No independent liability to either claimant.**—If the plaintiff is under an independent liability to one of the claimants, no matter which of them may have the superior claim to the subject matter, he cannot have interpleader. Thus, V stored certain iron with A, a warehouseman. Thereupon, V gave X an order for the iron, and A acknowledged his liability to X in such a way as to create a binding contract to deliver it to X. Later Y claimed the iron by a title paramount to V and X. A could not have interpleader to determine to whom he should deliver the iron.[97] It is said, in justification of the rule, that if Y were found to be the true owner of the iron, the litigation would not be at an end, but A would still have to answer in damages to X. The answer to this argument appears to be, that in cases where X is found to be the owner, that would end the matter; in fifty per cent of the instances

[94] Johnson v. Atkinson, 3 Anstr. 798 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 10.

[95] Attenborough v. London, etc., Dock Co., L. R. 3 C. P. D. 450 (Eng.).

[96] Pomeroy, Equity Jurisprudence, § 1324, note.

[97] Crawshay v. Thornton, 2 My. & Cr. 1, 19-24 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 18, 1 Keener, Equity Jurisdiction Cases, p. 220.

where plaintiff is under an independent liability, the interpleader order would be final so far as he is concerned. There appears to be no sound reason why the bailee should not be permitted to get the article off his hands, even if he still remains liable to a subsequent suit for damages.

Interpleader is one of the few topics of equity that needs a statutory overhauling to free it from the technicalities with which it is encumbered.

108. **Receivers.**—A receiver is a person appointed by the court in a chancery suit to hold, and in some cases to manage, the property involved in the litigation while it continues. During his appointment he acts as agent or officer of the court, not as the agent of either of the parties; and as agent is subject to the court's directions. The appointment of a receiver to take the possession of property away from the legal owner temporarily is the most drastic of all equitable remedies, only to be used with great caution, and where it is reasonably probable that the plaintiff will succeed in the purpose of his suit.[98] The appointment does not depend upon hard and fast rules, but rests in the sound discretion of the court.[99] It will rarely be made without notice to the defendant, if he can be reached, and an opportunity to be heard against the appointment; unless there is an urgent necessity for the court to interfere at once, to prevent the squander-

[98] Blondheim v. Moore, 11 Md. 365; Bank of Florence v. U. S. S. & L. Co., 104 Ala. 297, 16 South. 110, H. & B. 897.

[99] Mays v. Rose, Freem. Ch. 703 (Miss.); Simmons Hardware Co. v. Waibel, 1 S. Dak. 488, 47 N. W. 814, 814, 36 Am. St. Rep. 755, 11 L. R. A. 267, H. & B. 817.

ing or destruction of the property.[1] It is usually considered improper for the court to appoint as receiver one who is personally interested in the success of either party,[2] but in naming receivers of corporations the courts have sometimes felt obliged to break through this rule and appoint an officer of the corporation who is familiar with its complicated business.[3]

109. **Same subject—When appointed.**—We can enumerate only a few of the very many instances where the appointment of a receiver is appropriate. Most of these instances involve the facts that the person in possession is under a fiduciary duty—a quasi-trust relation—to the plaintiff, and is violating that duty by wasting the property or misapplying its proceeds: (1) In proceedings for the dissolution of a partnership, or after a dissolution, where there is a serious disagreement among the partners as to the management of the business, or one partner excludes the other from participation therein.[4] (2) In suits against trustees who are endangering the trust property by their misconduct.[5] (3) In creditors' suits by judgment creditors.[6] (4) In bankruptcy proceedings.[7] (5) In suits to foreclose a

[1] Blondheim v. Moore, 11 Md. 365; St. Louis, K. & S. R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341, H. & B. 823.

[2] Merchants', etc., Nat. Bank v. Kent Circuit Judge, 43 Mich. 292, 5 N. W. 627, H. & B. 855 (partner of attorney for a party).

[3] Fowler v. Jarvis-Conklin, etc., Co., 63 Fed. 888, 66 Fed. 14.

[4] Goodman v. Whitcomb, 1 Jac. & W. 589 (Eng.); Const v. Harris, Turn. & R. 517 (Eng.); McElvey v. Lewis, 76 N. Y. 373.

[5] Latham v. Chafee, 7 Fed. 520.

[6] See § 96; Bloodgood v. Clark, 4 Paige 574 (N. Y.); Coates Bros. v. Wilkes, 92 N. C. 376.

[7] See Bankruptcy Act of 1898, § 2, clauses 3 and 5.

mortgage or other lien. This is a common occasion for the appointment of a receiver, and the rules determining when the appointment is proper are fairly definite. At the outset of a foreclosure suit the mortgagee may have a receiver appointed on showing that the property is an inadequate security for the mortgage—that is, that it will not yield enough on foreclosure sale to pay the mortgage and accrued interest; and at the same time that a deficiency judgment against the mortgagor probably cannot be collected, either because he is insolvent, or of doubtful financial responsibility, or is outside the state and so cannot be reached. The function of such a receiver is to collect the rents and profits of the land pending the foreclosure proceedings and apply them to the payment of the mortgage debt—a duty which the mortgagor himself owes to the mortgagee.[8] Such receivership is permitted even in the states which forbid the mortgagee himself to take possession on default.[9]

110. **Same subject—Corporation receivers.**—Corporation receivers are so much the most numerous and important species that the law of receivership is often treated as if it were a branch of the law of corporations. Statutes in many states prescribe in great detail the occasions for the appointment of receivers of insolvent or of dissolved corporations.[10]

[8] Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124; Lindsay v. American Mortgage Co., 97 Ala. 412, 11 South. 770.

[9] Schreiber v. Carey, 48 Wis. 208. See § 150.

[10] This legislation is described in a general way in the long but interesting opinion in Havemeyer v. Superior Court, 84 Cal. 327, 363, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

Independently of statutes, there are certain well established grounds for the displacement of the board of directors of a corporation by the appointment of a receiver of the corporate property. Thus, in a stockholders' suit to hold the fraudulent or wasteful directors responsible for the breach of their fiduciary duties,[11] a receiver is frequently appointed.[12] Also, where there are such dissentions in the board of directors that the business of the corporation cannot be properly carried on, a receiver may be required for the purpose of taking control until a harmonious body can be constituted.[13] Receivers may be appointed in judgment creditors' suits against corporations equally as well as in similar suits against individuals.[14] Most important of all are receiverships on foreclosure of corporation mortgages.

Railroad receiverships, which attract so much public notice from time to time, usually occur in the course of the foreclosure of mortgages on all the property of the railroad, issued to secure the payment of the railroad's bonds. The vast responsibility of operating railroad systems, often thousands of miles in extent, and for a considerable term of years, thus falls upon the courts of chancery.[15] The

[11] See § 138.

[12] State v. Second Judicial District Court, 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392; compare Alabama Coal & C. Co. v. Shackelford, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23.

[13] Sternberg v. Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762.

[14] Hollins v. Brierfield, etc., Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

[15] It is said that about 1895 fully one-third of the railroad mileage of the country was being thus operated by the federal courts.

appointment of a receiver in railroad foreclosures has come to be almost a matter of course.[16]

Apart from statutory authority, however, it is generally agreed that a court of equity has no power to dissolve a corporation, or to appoint a receiver for that purpose;[17] or to appoint a receiver at the request of the corporation itself.[18]

111. **Same subject—The receiver's possession.**—Since the receiver is an officer of the court for the time being, his possession is that of the court, and will be jealously protected by the court. Parties to the suit or their agents may be ordered by the court to surrender possession of the property involved in the suit to the receiver, and their disobedience will constitute a contempt of court.[19] Any disturbance whatever of the receiver's possession, without authorization of the appointing court, is a serious contempt of that court.[20] Instances of such forbidden interference are: attachment,[21] or garnishment,[22] or execution sale of the property; it is even held, by the weight of authority, that such execution sale is wholly void, passing no title to the purchaser.[23] The property is not subject to levy and

[16] Central Trust Co. v. Chattanooga, etc., Co., 94 Fed. 275, 36 C. C. A. 241; Mercantile Trust Co. v. Missouri, K. & T. R. Co., 36 Fed. 221, 1 L. R. A. 397.

[17] Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122.

[18] State v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

[19] Brandt v. Allen, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653.

[20] Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147.

[21] Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647.

[22] Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

[23] Wiswall v. Sampson, 14 How. 52 (U. S.), 14 L. Ed. 322.

sale for taxes without leave of the appointing court.[24] This does not mean that receivership property is free from the common burden of taxation, but merely that the state's claim for taxes must be presented to and approved by the court in the same manner as other claims.

Interference with the operation of a railroad under receivership by employes on a "strike" has frequently been punished as contempt.[25]

112. **Same subject—Suits against and by the receiver.**—Suits by[26] or against the receiver may only be brought by permission of the appointing court. The order appointing the receiver frequently gives him general authority to bring suits; and in many states such authority has been conferred by statute. A suit against the receiver without leave of the appointing court is a contempt of court;[27] and not only that, but the proceedings, according to the majority rule, are wholly void, on the ground that the court in which the suit is brought is without jurisdiction.[28] Whether leave to sue the receiver should be granted or refused is a matter entirely within the discretion of the appointing court; but leave is not refused without good reason.[29] The rule was found to work such inconvenience to suitors where a receivership extended over a vast system of railroads that it was partially abolished, as respects claims arising from

[24] Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689.

[25] Thomas v. Cincinnati, &c., R. Co., 62 Fed. 803.

[26] Phoenix Insurance Co. v Schultz, 80 Fed. 334, 25 C. C. A. 453.

[27] Thompson v. Scott, 4 Dill. 508 (U. S.), Fed. Cas. No. 13,975.

[28] Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

[29] Pacific Ry. Co. v. Wade, 91 Cal. 449, 456, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

the acts of federal receivers, by Congress in 1887.[30]

113. **Same subject—Receiver's management of the property.**—The first duty of the receiver, as agent of the court, is, of course, to obey the orders of the court. These constitute his charter of authority; but in carrying out the orders he is allowed considerable discretion in matters of detail. He may not carry on the party's business unless ordered to do so by the court; such order confers upon him, by implication, authority to enter into necessary contracts.[31] He is under no obligation to carry on unfinished contracts or leases.[32] The necessity, for public convenience, of operating railroads which are under receivership, imposes some special duties upon railroad receivers. Such a receiver is often obliged to borrow money for the purpose of keeping the road in operation; and to enable him to borrow to advantage, the court empowers him to issue "receiver's certificates," which are a lien upon the railroad property taking precedence over the secured claims of mortgage bond holders.[33]

114. **Same subject—Claims against the fund.**—The court receives the property into its custody subject to all liens and equities with which it has been impressed;[34] but certain claims are superior in rank

[30] Dillingham v. Hawk, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517; 1 Pomeroy, Equitable Remedies, §§ 173, 174.

[31] Continental Trust Co. v. Toledo, etc., R. Co., 59 Fed. 514. See Farmers' Loan & Trust Co. v. Grape Creek Coal Co., 50 Fed. 481, LEADING ILLUSTRATIVE CASES.

[32] Dayton H. Co. v. Felsenthal, 116 Fed. 961, 54 C. C. A. 537.

[33] Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963.

[34] American Trust, etc., Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793.

to the secured claims which were attached to the property at the beginning of the receivership, and must be paid first. The claim of the state for taxes comes first of all.[35] The receiver's necessary expenses in administering his trust must, in general, be paid before the mortgages and lien holders;[36] this includes damages for the negligence of his servants and agents in managing the property or carrying on the business while the receivership continues.[37] Unsecured claims against the property arising before his appointment are, of course, postponed in payment to mortgage or other secured indebtedness. A striking exception has been made, however, in the case of railroad receiverships. A railroad has public duties to discharge and must at all hazards be kept a going concern. Employees and material men whose services or supplies are necessary to the continued operation of the road, must be assured that their wages and claims will be paid, those accruing before as well as those accruing after the appointment of the receiver. If the rule were otherwise, a railroad under the shadow of impending insolvency would find it difficult to procure the necessary labor and supplies to keep in operation. By a bold stroke of judicial legislation, therefore, the American courts established the rule, about thirty-four years ago, that unsecured debts of a railroad, incurred a reasonable time before the appointment of a receiver, if falling

[35] Central Trust Co. v. New York, etc., R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260.

[36] McLane v. Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

[37] Bartlett v. Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715.

within the class of necessary operating expenses, shall be paid in preference to the secured claims of mortgagees.[38] This rule does not extend to receiverships of manufacturing corporations, since the public has not the same interest in their continued operation.

115. **The auxiliary jurisdiction—Discovery.**—A small group of equitable remedies, of much more importance formerly than at present, has to do with the taking of evidence for use in trials at law. The purpose for which these remedies is used has led to their being placed in a group by themselves, called the "Auxiliary Jurisdiction." The common law, before the reforms of the nineteenth century in the law of evidence, furnished no mode by which a party to a suit could be examined as a witness by his adversary, or compelled to produce documents in his possession at the trial on demand of the other party. Now it has been one of the most characteristic features of equity procedure, from the earliest days, that the complainant may, in his bill (pleading), propound questions to the defendant, which the defendant must answer under oath, and thus disclose facts within his knowledge which are material to the complainant's case. This process is called "discovery," and is an important part of nearly all equity pleading. It was natural, therefore, that parties to actions at law should wish to avail themselves of this most effective machinery

[38] Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Lackawanna, etc., Co. v. Farmers' Loan & Tr. Co., 79 Fed. 202; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 74 Fed. 431.

of the chancery courts for the procuring of testimony. The bill for discovery, therefore, came into existence at an early day. In such a bill, the party to the action at law merely demands that the interrogatories of his bill be answered under oath by the defendant. He needs no further relief; having obtained the defendant's answer, the purpose of the equity proceeding is accomplished; and he may now introduce this answer in evidence in the legal action as a written admission of the other party.[39]

116. **Same subject—Effect of statutes upon the jurisdiction.**—Modern statutes both in England and in all the states of this country, dating from the middle of the last century, permit a party to an action at law to examine his adversary as a witness, and provide summary methods for compelling the production of books and documents for inspection. The suit for discovery in aid of an action at law has, therefore, in most instances, become unnecessary, and appears to be nearly obsolete. Most states, however, in which the question has arisen, hold that the suit for discovery has not been impliedly abolished, but may still be resorted to when it suits a party's convenience;[40] but this conclusion is not universal.[41]

117. **Same subject—Suits for examination of witnesses.**—The auxiliary jurisdiction of equity also embraced three suits for the purpose of taking the testimony of witnesses, other than parties to the

[39] Pomeroy, Equity Jurisprudence, § 191.

[40] Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 346, 51 Atl. 1075, 93 Am. St. Rep. 535, 550, 57 L. R. A. 949, 1 Scott, Cases on Equity, p. 45.

[41] Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

action at law, in emergencies where the common law afforded no means for obtaining such testimony. The suit to perpetuate testimony lay where a person had an existing right, but no action could be brought immediately for the purpose of establishing the right. The danger of loss of essential evidence by the death of witnesses was the foundation and occasion of the suit. The suit to take testimony de bene esse lay where an action at law was pending but not yet ripe for trial, for the purpose of examining a witness who was sick, or very aged, or about to depart from the country. The third suit lay to take the testimony of witnesses in a foreign country.[42] These three suits are probably entirely obsolete at the present day, being supplanted by simpler and speedier proceedings established by statute.

[42] On these three suits, see Angell v. Angell, 1 Sim. & St. 83 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 168.

PART II

EQUITABLE PROPERTY RIGHTS AND INTERESTS

118. **Equitable estates.**—So far we have been dealing with what is perhaps the most distinctive part of equity, its peculiar system of remedies, entirely different, for the most part, from the remedies known to the common law. A second grand division of the subject (as usually treated) has to do with equitable estates or property rights, and equitable liens: and, incidentally, with the remedies for their enforcement. An example has already been given of what is generally called an equitable estate, in the interest which a vendee of land under a valid, enforceable contract, holds in the land. As we saw, he is regarded in equity, in most respects, as the true owner, though the legal title is still in his vendor; for example, on his death his interest devolves, as land, upon his heirs, not upon his administrator: and he must, as owner, bear the loss resulting from the accidental destruction of the property. This separation of the legal title and the beneficial interest is the characteristic feature of equitable estates. The legal title is in A, the only owner whom the common law recognizes, and whose legal title is not denied by equity; while the beneficial interest,

in greater or less degree, is in B, the equitable owner. In many cases this separation of the legal and equitable ownership is convenient and desirable, and therefore is treated as permanent; as in the case of an express trustee, who holds the legal title for the benefit of the cestui que trust or beneficiary: or of the mortgagee, who holds the legal title as security for his claim. In other cases, the sole duty of the legal owner, A, is to convert the equitable into a full ownership by conveyance of the legal title to the equitable owner, B.[48]

[48] 1 Pomeroy, Equity Jurisprudence, §§ 146-149.

CHAPTER VIII.

TRUSTS.

119. **Uses.**—Some time in the later middle ages, probably in the fourteenth century,[44] the desire of the clergy to evade the statutes of mortmain, which restricted their ownership of land, and of land owners to escape the heavy feudal burdens, led to the invention of the Use—a conveyance of the legal title by A to B to the use of C, or by A to B for the use of A himself. The common law courts refused to recognize any ownership in the beneficiary or cestui que use; his ownership was protected, at first by the clergy acting upon the conscience of the holder of the legal title, and presently by the courts of chancery.[45] When fully developed, the use was the full beneficial ownership of the land, freed from feudal burdens and from many common law incidents, such as dower. The cestui que use had the right of possession; the use descended to his heirs, and the holder of the legal title was bound to convey it, on the request of the cestui que use, and to defend his possession from the intrusion of third persons.[46] By the middle of the fifteenth century it is said that the greater part of the land in England was held in this manner.

120. **The Statute of Uses—Trusts.**—In the year

[44] 1 Spence, Equitable Jurisdiction, pp. 439-442.
[45] 1 Spence, Equitable Jurisdiction, pp. 445, 446.
[46] Bacon, Reading on Uses, p. 9.

1535, the king, Henry VIII, caused a statute to be passed for the avowed purpose of preventing the further growth of uses. This statute, however, instead of prohibiting uses, adopted the curious expedient of declaring (in substance) that when land was conveyed to A in fee or for life for the use of B, a legal estate of the same extent as the use should become vested in B. The statute, however, was given a very narrow application by the courts. It did not apply, for example, where A had any active duties to perform. Again, the case having arisen where land was conveyed to A to the use of B to the use of C, it was held that the statute vested the legal title in B,[47] while C obtained an equitable estate as before the statute.[48] The net result of the statute was to effect great changes in the law of conveyancing, giving rise to forms of deeds which are in common use today;[49] but the doctrines of equity which had grown up relating to uses remained substantially unimpaired. Verbal changes were made, however; the beneficial interest recognized by equity alone was called a trust; the holder of the legal title was called a trustee; and the holder of the beneficial interest was called the cestui que trust or, less technically, the beneficiary.

121. **Classes of trusts—Passive trusts.**—Trusts are divided into two classes, express trusts, intentionally created by the act of a party, and trusts arising by operation of law.[50] Express trusts com-

[47] Tyrrel's Case, 2 Dyer 155a (Eng.).
[48] Hopkins v. Hopkins, 1 Atk. 581, 590 (Eng.).
[49] See a brief account in Pomeroy, Equity Jurisprudence, § 985, note.
[50] See §§ 129-133.

prise public or charitable,[51] and private trusts, the latter being created for the benefit of designated persons. Express private trusts, again, may be either passive or active. If land is conveyed to or held by A simply in trust for B, without any words defining A's duties, we have a passive trust. A holds the mere naked legal title to the land, while B holds the full beneficial ownership in equity, and is entitled to the management and control of the land. Such trusts in land are prohibited by statute in some states, and are very uncommon in this country.[52]

122. **Express active trusts.**—In these the trustee is charged with the performance of active duties for the benefit of the cestuis que trustent or beneficiaries. The terms of the trust generally give the trustee the possession and management of the property, whether real or personal. Trusts may, as a general rule, be created for any purpose not illegal; only a small group of states, following the example of New York, having restricted the purposes for which trusts are allowed. Among the commonest purposes for which trusts are created are: to hold the property, receive the rents and profits and pay them or apply them to the use of designated persons or apply them to designated purposes such as the payment of debts; to hold the property and invest the income for a specified time, not exceeding the period permitted by statute, thus accumulating the entire proceeds—a trust for accumulation; to sell the property and pay the proceeds to designated persons or apply them to

[51] See §§ 126, 127.

[52] Pomeroy, Equity Jurisprudence, § 988.

specified purposes; and in connection with the two purposes first enumerated, to convey the trust property to some person or persons at the expiration of the trust.[53]

123. **Parties to trusts.**—Any owner of property who has the legal capacity to dispose of it may create a trust; any person capable of holding property may be a beneficiary or a trustee.[54] Since the beneficiary's interest is not recognized as an ownership by the common law,[55] actions at law relating to the property must be brought by the trustee.[56] The cestui que trust may compel a specific performance of the trustee's duties,[57] but his interest, under an active trust, can hardly be considered an estate in the land or personal property which is the subject of the trust.[58]

124. **Alienation and liability for debts.**—The beneficiary's interest may ordinarily be conveyed or assigned by him:[59] and may in most trusts be reached by his creditors—either by execution, where the scope of the writ of execution has been enlarged sufficiently by statute, or by creditors' bill.[60] It is the rule in the majority of the states, however, that if the creator of the trust indicates by apt language that the beneficiary is to hold his interest free from

[53] Pomeroy, Equity Jurisprudence, §§ 992 and following.

[54] Still v. Ruby, 35 Pa. St. 373, Ames, Cases on Trusts, p. 219; Re Wadsworth, 2 Barb. Ch. 381 (N. Y.), Ames, Cases on Trusts, p. 511.

[55] Gandy v. Fortner, 119 Ala. 303, 24 South. 425.

[56] Price v. Krasnoff, 60 S. C. 172, 38 S. E. 413.

[57] Pomeroy, Equity Jurisprudence, § 1411.

[58] Id., § 991.

[59] For an exception in cases of trusts for married women, see § 141.

[60] See § 96.

the claims of his creditors, this provision will be respected, and his income will be beyond his creditors' reach.[61] Such a provision constitutes what is appropriately called a "spendthrift" trust, and is invalid in some states and in England.[62] All courts agree that a person cannot create a spendthrift trust for his own benefit, so as to place his property beyond the reach of his creditors.[63]

125. **Descent and succession.**—The rules of descent and succession applicable to legal estates apply to the corresponding equitable interests of cestuis que trustent.[64] In this respect equity follows the law. The husband of a cestui que trust, also, has curtesy in the lands held in trust for his wife under the same circumstances in which he would have curtesy in her legal estate.[65] Equity was not, however, equally generous to the wife: she had no dower in her husband's equitable interests.[66] This arbitrary rule has been altered by statute in the wife's favor in most states of this country.

126. **Charitable trusts.**—If a man were to leave property to be divided among all his fourth cousins,

[61] Broadway National Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, Ames, Cases on Trusts, p. 397; Jackson Square L. & S. Association v. Bartlett, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416.

[62] Brandon v. Robinson, 18 Ves. 429 (Eng.), Ames, Trusts, p. 394; Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384.

[63] Brown v. Macgill, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806.

[64] Burgess v. Wheate, 1 Eden 177 (Eng.), Ames, Cases on Trusts, p. 356, 1 Scott, Cases on Equity, pp. 58, 316; Middleton v. Spicer, 1 Br. Ch. Cas. 201 (Eng.), Ames, Cases on Trusts, p. 364.

[65] Appleton v. Rowley, L. R. 8 Eq. 139 (Eng.), Ames, Cases on Trusts, p. 381.

[66] D'Arcy v. Blake, 2 Sch. & Lef. 387 (Ire.), Ames, Cases on Trusts, p. 376.

the beneficiaries, though perhaps several hundred in number, are exactly ascertainable—the trust is of the private class. If he were to leave a sum of money in trust for all the dark haired persons in the town of X, the trust, still a private one, would probably fail for uncertainty as to the beneficiaries. Suppose he leaves a sum to A in trust for "the poor" of the town of X. This is a highly indefinite description of the objects of his bounty: but the trust, in nearly all states, will be upheld, since it is for a public or charitable object—the relief of poverty.[67] Again, A leaves a sum of money in trust for the perpetual repair of his tomb. This is a private object, and the trust must fail, as creating a perpetuity.[68] Suppose, however, that he leaves a sum in trust to keep the Soldiers' Monument in the town of X in perpetual repair. This is a public trust, for the benefit of the whole community, and the rule against perpetuities does not apply. These, then, are the characteristics of a charitable trust; the beneficiaries are indefinite, the purpose is a public benefit, and the duration of the trust is not limited by the rule against perpetuities.

127. **What are public or charitable purposes.**—This is a question that can only be elucidated by numerous examples. Gifts for the support of religion are freely upheld, no distinction among religious beliefs being recognized by the courts of this

[67] Bishop of Hereford v. Adams, 7 Ves. 324 (Eng.); Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438, LEADING ILLUSTRATIVE CASES.

[68] See Estate of Gay, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70. For the rule against perpetuities, see article on REAL PROPERTY.

country, at any rate.[69] So with trusts for any of the objects which are popularly called charitable; as, to the poor, to hospitals and asylums, to widows and orphans.[70] A gift to a private benefit society or association, however, not limited in its distribution to members who are in need, is generally considered not a charity but a private trust.[71] Gifts for all manner of educational purposes, for the advancement of science, knowledge, or art, are charitable gifts, in the legal meaning of the term,[72] and their validity does not depend at all upon the truth or falsity of the opinions sought to be promoted by the gift, so long as they are not immoral or illegal; thus, a trust for the circulation of the books of Henry George, which attacked the right of private property in land, was upheld.[73] In general, any gift which benefits the public as distinguished from individuals, —as, for the erection of a court-house[74]—may be a valid charitable trust.

128. **Creation of express trusts.**—The Statute of Frauds provides, in substance, that a trust in lands

[69] Even though the language of the gift is very broad and indefinite: as, "to the service of God." In re Darling, (1896) 1 Ch. 50 (Eng.). Some religious objects have been held to be essentially private, however, as, masses for the soul of the donor: Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360 (but on this point the cases are in conflict); and see Cocks v. Manners, L. R. 12 Eq. 574 (Eng.); Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906; and numerous cases in 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1021, note.

[70] See examples in 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1022, note.

[71] Cunnack v. Edwards, (1896) 2 Ch. 679 (Eng.).

[72] In re John's Will, 30 Ore. 494, 47 Pac. 341, 36 L. R. A. 242; Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

[73] George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511.

[74] Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238.

shall be proved by some writing signed by the party who is by law enabled to declare the trust. Under the language of the Statute, the writing may be subsequent in time to the declaration of the trust. Thus, A, wishing to create a trust in Blackacre in favor of C, may convey it to B and in the deed of conveyance state that B shall hold in trust for C: or after his conveyance to B without mention of the trust, B may execute a writing declaring that he holds in trust for C; or, A, without any conveyance may declare in writing that he, A, holds Blackacre in trust for C.[75] Trusts in personal property are not embraced within the Statute, and may be proved orally.[76] The writing evidencing a trust in lands may be perfectly informal and untechnical: the words "trust" or "trustee" need not be used; but there must be a reasonable degree of certainty as to the property to be held in trust, as to the beneficiaries (except in charitable trusts), and the nature of the beneficiary's interest.[77] The intention to create a trust is often gathered, not from particular words, but by construction of the whole will or other instrument.[78]

129. **Resulting and constructive trusts.**—We have now to consider trusts created not by the deliberate act of the parties but by operation of law—much the more common and important class, in this

[75] See cases cited, Pomeroy, Equity Jurisprudence, § 1007.

[76] McFadden v. Jenkins, 1 Phill. Ch. 153, 157 (Eng.), Ames, Cases on Trusts, p. 47; Danser v. Warwick, 33 N. J. Eq. 133, Ames, Cases on Trusts, p. 186.

[77] Pomeroy, Equity Jurisprudence, § 1009.

[78] Id., §§ 1010-1017.

country. There are two distinctive features of these trusts: first, the act of the trustee in withholding the legal estate from the beneficiary is wrongful; it is his duty to make, and the beneficiary's right to receive, an immediate conveyance;[79] second, since they do not arise from the declaration of the parties but by operation of law, the Statute of Frauds has no application.[80] They are divided into two groups, resulting trusts and constructive trusts—the latter group always involving and depending upon some fraud, actual or constructive, on the part of the person declared by equity to be a trustee.[81]

130. **Resulting trusts.**—The two commonest species of these trusts are: first, where an express trust has been created, but fails in whole or in part; as, where it is illegal,[82] or too uncertain to be carried out,[83] or lapses by the death of the beneficiary;[84] in such cases, the person named as trustee does not acquire a beneficial interest but holds the property for the creator of the trust; or if the latter be dead, for his heirs or administrator, or his residuary devisees or legatees; unless, of course, the creator of the trust has made some other disposition of the property to meet the emergency. Second, suppose property is conveyed to A, but the purchase price is paid by B, as part of the same transaction; in accordance with a doctrine that dates back to a time

[79] Pomeroy, Equity Jurisprudence, § 1058.
[80] Id., § 1030.
[81] Id., § 1044.
[82] Pawson v. Brown, L. R. 13 Ch. Div. 202 (Eng.).
[83] Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.
[84] Ackroyd v. Smithson, 1 Brown Ch. 503 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 977, 1 Scott, Cases on Equity, p. 621.

before the Statute of Uses,[85] the equitable estate follows the consideration, and A, by operation of law, holds the property on a resulting trust for B.[86] Since this result, however, depends upon the presumed intention of the parties, it is open to A to show by parol evidence that a gift was intended by B to A, and no trust results.[87] Again, if A, in whose name the property is taken, is the child or wife of B, or a person whom B is under obligation to support, the transaction is taken to be a gift to A;[88] unless, indeed, B succeeds in establishing by clear proof that a trust in his favor was intended.[89]

131. **Constructive trusts.**—The following are some of the more important species of constructive trusts: A, a trustee, or a person in a fiduciary relation to B—such as an agent or attorney—takes advantage of his relation and unfairly acquires the property by purchase or gift from B; or purchases it at a public or private sale of the property:[90] or uses it in his business and thereby acquires a profit:[91] in all such cases a trust for B is impressed upon the property or the profits. A and B, partners, occupy certain premises for the purpose of their business under a lease which is about to expire; A takes a

[85] Pomeroy, Equity Jurisprudence, § 981.

[86] Dyer v. Dyer, 2 Cox 92 (Eng.), H. & B. 452; Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091; Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, and note, 1 L. R. A. 327.

[87] Ward v. Ward, 59 Conn. 188, 22 Atl. 149.

[88] Dyer v. Dyer, 2 Cox 92 (Eng.), H. & B. 452; Smithsonian Institute v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; Cooley v. Cooley, 172 Mass. 476, 52 N. E. 631.

[89] Kilpin v. Kilpin, 1 Mylne & K. 520 (Eng.).

[90] For examples, see § 180.

[91] See §§ 134, 135.

renewal of the lease from the lessor for his own exclusive benefit: he will hold the premises in trust for the firm and usually will be compelled to assign the lease to the firm.[92] A trustee or other person holding trust funds uses them to purchase property —either with or without authority—and takes the title in his own name, without declaring any trust: he nevertheless holds the property so purchased in trust for the person to whom the fund belonged.[93]

132. **Same subject.**—The trustee, in breach of the trust, conveys or transfers the property to a person who is not a bona fide purchaser for a valuable consideration without notice; such person in turn becomes a trustee, and the property may be followed in his hands so long as it can be identified.[94] The beneficiary, too, has the option of following the proceeds of the sale by the trustee in the trustee's hands; and if the trustee uses the proceeds in the purchase of other property, a trust attaches to that property. In general, the property which is the subject of the original trust remains impressed with a trust, no matter what changes may take place in its form. The trustee cannot rid himself of his responsibility by his own misconduct.[95]

133. **Same subject—Trusts ex maleficio.**—In general, whenever property is acquired through actual or constructive fraud, it is impressed with a con-

[92] Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252, H. & B. 48.

[93] Ferris v. Van Vechten, 73 N. Y. 113, H. & B. 461.

[94] Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152, H. & B. 477; Wetmore v. Porter, 92 N. Y. 76, Ames, Cases on Trusts, p. 262.

[95] Pennell v. Deffell, 4 De G. M. & G. 372, 388 (Eng.); McDonough v. O'Neil, 113 Mass. 92. See Curdy v. Berton, 79 Cal. 420, LEADING ILLUSTRATIVE CASES.

structive trust in favor of the defrauded party. This method of declaring the defrauding party a trustee is a most powerful weapon in the hands of the court of chancery. Among the infinite number of instances of its use are the following: X, a testator, intending to make a devise to B, on account of the fraudulent representations or promises of A that he, A, will carry out X's intentions and confer the intended bounty upon B, X is persuaded to make the devise to A instead. A, after X's death, claims to hold the title free from any claim of B. Equity will impress a trust in B's favor upon A's legal title to the property devised.[96] Again, B's property is about to be sold at foreclosure or execution sale. A fraudulently promises B to buy in the property, to hold it for B, and convey it to B on being repaid his advances. A purchases, and then refuses to comply with his promise. The promise is, of course, void under the Statute of Frauds; but A is held a constructive trustee on account of his fraud.[97]

134. **Duties of express trustees.**—The trustee's prime duty is to obey the directions of the creator of the trust contained in the declaration of trust. Having once accepted his office, he is liable to the beneficiary if he fails to carry out or disobeys these directions. If there is any genuine doubt as to the meaning of the directions or the terms of the trust, he may bring a suit in equity, at the expense of the estate, to obtain an interpretation of the instrument; and his failure to obey the directions as interpreted

[96] O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53, H. & B. 495.
[97] Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696, H. & B. 488.

by the court will expose him to punishment for contempt.[98] It is his duty to keep full and accurate accounts of all his transactions relating to the estate, and these accounts should be open to the inspection of the beneficiary.[99] At the expiration of his trust, he is bound to surrender the property to the persons who are then entitled to it.[1]

135. **Duty of care and diligence.**—The trustee is not an insurer; but he is bound to use the same degree of skill and care in the management of the trust property that a man of ordinary skill and prudence would use in the management of similar property of his own.[2] He must exert due diligence to reduce the property to possession and collect debts and demands due to the estate.[3] He must not delegate his discretionary powers to another,[4] but he may employ servants and agents whenever that is in accordance with the usual mode of conducting the business.[5] He may deposit trust moneys in a bank of good reputation, but only for a reasonable time,[6] since it is his duty to keep the trust funds invested.[7] As to the nature of the investments permitted, where

[98] Lake View M. & M. Co. v. Hannon, 93 Ala. 87, 9 South. 539.

[99] Waterman v. Alden, 144 Ill. 90, 32 N. E. 972, H. & B. 549.

[1] Goodson v. Ellisson, 3 Russ. 583 (Eng.), Ames, Cases on Trusts, p. 451.

[2] King v. Talbot, 40 N. Y. 76, 50 Barb. 453, Ames, Cases on Trusts, p. 473, H. & B. 511; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, H. & B. 507.

[3] Lowson v. Copeland, 2 Br. Ch. Cas. 156 (Eng.), Ames, Cases on Trusts, p. 492.

[4] Cooke v. Crawford, 13 Sim. 91 (Eng.), Ames, Cases on Trusts, p. 509.

[5] Speight v. Gaunt, L. R. 22 Ch. Div. 727 (Eng.), Ames, Cases on Trusts, p. 518; Field v. Field, (1894) 1 Ch. 425 (Eng.), Ames, Cases on Trusts, p. 505.

[6] Cann v. Cann, 1 P. W. 567 (Eng.), Ames, Cases on Trusts, p. 481.

[7] Robinson v. Robinson, 1 De G. M. & G. 247 (Eng.), Ames, Cases on Trusts, p. 495.

the trust instrument gives no directions on the subject, the rules are very strict. The object of supreme importance is the security of the fund: the trustee is therefore not permitted to take the same amount of risk which an average business man would take in the investment of his own money. He may invest on good security, in first mortgages of land, or in bonds of the state or of the United States; but, unless the rules on the subject have been changed by statute, he should not invest in the stock or bonds of private corporations, much less in personal securities. If any loss results from an improper investment, the trustee must make up the deficiency.[8]

The trustee's duty to act with good faith and solely for the advantage of the beneficiary has already been illustrated, and will be referred to again.[9]

136. **The trustee's compensation and allowance.** —By the rule of English equity, the trustee is entitled to no compensation for his services, unless such compensation is provided for by the creator of the trust. This harsh rule has been changed in the United States. In many states his compensation is regulated by statute: in the absence of statute, the court awards a reasonable sum, proportioned to the value of his services; unless the rate has been fixed by the trust instrument.[10] In both countries the

[8] See, as to investments, Robinson v. Robinson, 1 De G. M. & G. 247, 263 (Eng.), Ames, Cases on Trusts, p. 495; King v. Talbot, 40 N. Y. 76, 50 Barb. 453, Ames, Cases on Trusts, p. 472, H. & B. 511; Lamar v. Micou, 112 U. S. 452, 465, 5 Sup. Ct. 221, 28 L. Ed. 751, H. & B. 515; Harvard College v. Amory, 9 Pick. 446 (Mass.), H. & B. 526.

[9] See §§ 131, 132, 180.

[10] In re Schell, 53 N. Y. 263, H. & B. 543; Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 208.

trustee is entitled to allowance out of the estate for all his proper expenses in connection with the trust.[11]

137. **Removal and appointment of trustees.**—The court of equity has considerable discretion in the matter of the removal of trustees. It will remove a trustee who is incompetent through age or infirmity, or who has been guilty of a breach of trust, or who has permanently removed to another country, or who is insolvent.[12] It will also appoint new trustees when there is a vacancy, either because of removal, resignation, death, failure of the trustees named in the instrument to accept, or failure of the instrument creating the trust to name trustees. A trust will not be allowed to fail for lack of a trustee.[13]

138. **Quasi-trustees — Corporation directors — Stockholders' suits.**—The definition of trust involves the conception that the trustee holds the legal title to the property. In addition, there are many relationships which do not involve this technical element of the trust, which are nevertheless fiduciary in their character, requiring the same duties of good faith and disinterestedness as are exacted of technical trustees. Such are the relationship of guardian and ward, of partners to each other, of many agents to their principals; and to a large extent, of corporation directors to the corporation. We have already seen that the equitable suit for accounting

[11] Worrall v. Harford, 8 Ves. 4 (Eng.), Ames, Cases on Trusts, p. 415; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111.

[12] See In re Barker's Trusts, L. R. 1 Ch. Div. 43 (Eng.), Ames, Cases on Trusts, p. 223, H. & B. 54; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

[13] Dodkins v. Brunt, L. R. 6 Eq. 580 (Eng.), Ames, Trusts, p. 226; Wilding v. Balder, 21 Beav. 222 (Eng.), Ames, Cases on Trusts, p. 221.

140. **Her power of disposition and contract.**—The power of the wife over her separate estate according to the English[21] system is fully as great as if she were unmarried. Unless restricted by the instrument creating the estate, she has an absolute power to dispose of it without the assent of her husband, whether it consists of personal property, or a life estate, or an estate in fee in land.[22] To enable her enjoyment of and control over her estate to be complete, she was permitted by equity to make contracts with reference to it,[23] and even to make many species of more formal contracts that had no direct reference to it;[24] these contracts, of course, were not recognized by the common law, and even in equity they created no personal liability against her; but they created a liability against her separate estate which the creditors could enforce by a suit in equity.[25]

141. **The restraint upon anticipation.**—It was found by experience that the creation of the separate estate did not fully accomplish its purpose of removing the wife's property from the husband's control. So long as she had full power of disposition of it and of contracting with reference to it, there was the danger that the moral coercion or influence of the husband might bring it as completely under his control, in many cases, as though he retained his

[21] The rules of the American jurisdictions with respect to her power to dispose of the separate estate, whether equitable or statutory, and her power to contract, are too numerous and complicated to be noticed here.

[22] Farington v. Parker, L. R. 4 Eq. 116. (Eng.); Major v. Lansley, 2 Russ. & M. 355 (Eng.); Taylor v. Meads, 4 De G. J. & S. 597, 604 (Eng.).

[23] Hodgson v. Williamson, L. R. 15 Ch. Div. 87 (Eng.).

[24] Murray v. Barlee, 3 Mylne & K. 209 (Eng.).

[25] Owens v. Dickenson, Craig & P. 48, 54 (Eng.).

common law rights. Consequently at a comparatively late period, the "restraint upon anticipation" was invented. This was a clause in the instrument of trust or marriage settlement by which the wife was forbidden to bargain or give away the income of her estate in advance of receiving it, or from disposing of or charging the principal of her separate estate.[26] The restraint operated only during marriage; before marriage or during widowhood her power over her separate estate was as complete as if no restraint had been created.[27]

142. **The equity to a settlement.**—The solicitude shown by courts of equity for the welfare of married women was not limited to the protection of separate estates created for them by other persons; in some instances the court created such an estate itself. To be sure, it never went to the extent of ordaining that every married man must relinquish his control over his wife's property. Equity, in modern times, does not run amuck among legal rules and institutions. Its method was more cautious and characteristic. Whenever a husband must resort to equity in order to reduce his wife's estate into his possession, it came to be the practice of the court to require him, as a condition of obtaining equitable relief, to make a suitable settlement upon the wife out of her property. This practice illustrates in the most striking way the maxim, "He who seeks equity must do equity." Similarly, where the wife's property is in

[26] Hood-Barrs v. Heriot, (1896) A. C. 174 (Eng.); Pike v. Fitzgibbon, L. R. 17 Ch. Div. 454 (Eng.).

[27] Tullet v. Armstrong, 1 Beav. 1, 22, 4 Mylne & C. 377, 392 (Eng.).

any way under the control of the court of equity, the husband cannot remove it from such control without making provision for the wife.[28]

143. **Interests arising from equitable conversion.** —We have already noticed, in connection with the effect of a valid contract for the purchase and sale of land, one instance of what is known as equitable conversion—which, by the way, has nothing whatever to do with "conversion" in the law of torts. The vendor's interest, though he retained the legal title to the land, is considered as personalty, and goes on his death to his administrator or executor; while the vendee's interest in equity is considered to be land and goes to his heir or devisee.[29] Conversion may also be effected by directions in a written instrument—most generally, in this country, in a will. A devises land with a direction—either explicit or gathered from the general purposes of the devise—to a trustee or executor to sell the land and pay the proceeds to B. B is considered by equity to have received a gift of money from A, not of land; therefore if B dies before the sale is made, the proceeds of the sale are payable, not to B's heir or devisee, but to his executor or administrator. Again, A bequeaths a sum of money, with directions to trustees that they invest it in land and convey the land to B. B is considered in equity to have received a devise of land; so that if he dies before the lands are actually purchased, his heirs or devisees take, and not his personal representatives. It should be noted,

[28] Lady Elibank v. Montolieu, 5 Ves. 737 (Eng.); Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

[29] See § 36; Wheless v. Wheless, 92 Tenn. 293, LEADING ILLUSTRATIVE CASES.

however, that the direction to sell or invest, as the case may be, must be imperative in order to have this effect; if the question whether the sale or investment shall take place is left to the discretion of the trustee or executor, there is no implied or equitable conversion.[30] The doctrine of conversion is summed up in the somewhat vague maxim, "Equity looks upon that as done which ought to be done."[31]

144. **Reconversion.**—The person for whose benefit land is directed to be converted into money, or money into land, may prefer to take the property in its original form. This he may do, if he be *sui juris,* at his election:[32] or if he be an infant, the court may elect for him if that be to his advantage.[33] This process is called reconversion. The election to retain the land as land, however, will not be permitted against the consent of co-owners who prefer a sale; since the sale of an undivided interest in land is usually disadvantageous, not realizing the full proportionate value of the interest.[34]

145. **Administration of estates of decedents.**—The administration of the estates of decedents formed what was perhaps the most important part of the business of the English courts of chancery,

[30] Fletcher v. Ashburner, 1 Bro. Ch. 497 (Eng.), 1 Scott, Cases on Equity, p. 606; Prentice v. Janssen, 79 N. Y. 478, 1 Scott, Cases on Equity, p. 639, H. & B. 163; Craig v. Leslie, 3 Wheat. 563 (U. S.), 1 Scott, Cases on Equity, p. 611, H. & B. 39.

[31] See § 227.

[32] Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Prentice v. Janssen, 79 N. Y. 478, 1 Scott, Cases on Equity, p. 639, H. & B. 163.

[33] Seeley v. Jago, 1 P. Wms. 389 (Eng.), 1 Scott, Cases on Equity, p. 635.

[34] Fletcher v. Ashburner, 1 Bro. C. C. 497, 500 (Eng.), 1 Scott, Cases on Equity, p. 606.

owing to the very limited powers of the courts of probate and the inadequacy of common-law remedies. In this country, however, in every state, the greater part of the business of administration has been committed by statute to the probate courts; and a large part of the rules which these courts administer—for example, on the subjects of legacies and of the marshalling of assets—is of equitable origin. In nearly all the states, however, there are subjects omitted from the statutes which compel an appeal to equity jurisdiction with greater or less frequency. There is such great variety in the probate and administration laws of the different states that it is impossible to lay down any general rules as to the extent of American equity jurisdiction on this subject.[35] A frequent cause for the interposition of equity, to give one example, is the bill by judgment creditors of the deceased to reach and bring into the estate property conveyed by the deceased in fraud of his creditors: for the executor or administrator, in many states, does not represent the creditor, but is considered to stand in the shoes of the deceased, and therefore cannot set aside a conveyance which the deceased himself could not avoid.[36] Again, in nearly every state the administration of trusts created by a will is considered within the exclusive jurisdiction of courts of equity.

146. **Jurisdiction over infants.**—Another part of the business of courts of chancery, of great impor-

[35] See 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1154, for an exhaustive collection of the decisions in each state.

[36] McDonald v. Aten, 1 Ohio St. 293.

tance in England but of comparatively slight importance in this country, is the jurisdiction over infants. Whenever an infant is brought before the equity court as a party to any proceeding, he becomes a "ward of the court."[37] The court then appoints a guardian, if none has already been appointed. The court also may remove an infant from the custody of his father or mother or other guardian when the parent or guardian is morally unfit, or negligent of the child's education, or is endangering the infant's property.[38] The court exercises a careful control over the guardian's management of the infant's property, and through the guardian sees to it that the infant receives an education, moral and religious as well as intellectual, suited to his station in life. The English court even exercises a strict control over the marriage of its infant ward; such marriage, without the consent of the court, is a most serious contempt, even if the parents of the infant are living.[39] The guardianship of infants, like the administration of decedents' estates, is minutely regulated by statute in all the states of this country, and usually committed to the probate courts; but the jurisdiction of equity is occasionally invoked for special purposes.

147. **Jurisdiction over lunatics and idiots.**—The jurisdiction to adjudge a person to be a lunatic or idiot and appoint a committee belonged to the chancellor as an officer of the crown rather than to the

[37] McGowan v. Lufburrow, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427.
[38] Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831.
[39] 3 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1308-1310.

court of chancery. Courts of equity in this country, therefore, do not profess to have such a jurisdiction, unless it has been conferred upon them by statute. The subject of lunatics and idiots, in this country, is regulated by legislation.[40]

[40] Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637.

CHAPTER X.

MORTGAGES.

148. **Mortgages—English common law and equity theory.**—A mortgage at common law was a conveyance of the legal estate by A, the mortgagor, to B, the mortgagee, subject to the condition that if, on a prescribed day A paid B a sum of money, the legal estate immediately revested in A. If, however, A allowed the pay day to pass without tendering the amount due, B's estate became absolute, and all right of A's to recover the land was entirely forfeited. The harshness of this result caused equity to interfere, about three centuries ago, with its characteristic invention, the Equity of Redemption. Equity gave A the right, enforceable by suit, to pay the amount due at a later date than the prescribed day, and on such payment compelled B to deed back the land to A. This right came to be regarded as creating in A the substantial interest in the land, an equitable estate—also called the equity of redemption,—which passed on A's death to his heirs. The equity courts, however, scrupulously recognized, in form, the legal right of B, the mortgagee, growing out of his ownership of the legal estate, to the possession of the property. B, therefore, was entitled to take possession of the land and to receive the rents and profits as soon as the mortgage was executed (unless the right to possession was reserved

to A in the instrument), or at any other time until the land was redeemed by payment of the debt; and equity would not interfere with his possession. Furthermore, B, as the party entitled to possession, was the only one who could recover the land from a third person. Equity, however, regarding the mortgagor's right as the substantial interest in the land, and B, the mortgagee, as holding his legal estate merely as security for the debt, compelled B when in possession to account for the rents and profits which he received, and to apply them in part payment of the interest on and the principal of the mortgage debt. B, therefore, might extinguish the debt, little by little, by going into possession. He was not limited to this method, however. He might, after the debt was due, bring a suit for foreclosure of—i. e., for cutting off or putting an end to—the equity of redemption. In such a suit the court, after ascertaining what was due to the mortgagee, gave the mortgagor a limited time—say six months—in which to make payment: and decreed that in default of such payment A's equity of redemption should be at an end. This sort of foreclosure practically consisted in removing from B's legal estate the cloud created by A's equity of redemption.[41]

149. **American theories—Title theory states.**—Under the English system we see the legal and the equitable conception of the mortgage existing side by side, neither having any influence whatever upon the other. In America the equitable ideas about the mortgage relation have influenced the common law

[41] Pomeroy, Equity Jurisprudence, §§ 1179-1185.

courts and have been adopted by them to a greater or less extent. One group—composed of all the Eastern states except New York, of most of the Southern states, and of two or three of the Western states, notably Illinois,—has made less departure from the English theory than the other group. In these states the mortgagee, as a general thing, has no right of possession of the premises until the mortgagor has committed default—has allowed the pay day to go by without tendering the debt and interest. As between the mortgagor and mortgagee the mortgagee is clothed with the legal title, while as against the rest of the world the estate, both legal and equitable, is in the mortgagor, who is entitled to recover possession from third persons. This result is certainly illogical and confusing as compared either with the English system or with the system in the other states.[42]

150. **Lien theory states.**—In the second group of states—composed of New York, nearly all the Western and some of the Southern states—the legal theory of the mortgage has been entirely abandoned. A mortgage creates no estate whatever in the mortgagee (though the mortgage instrument is still worded as a conveyance). The mortgagee has a mere equitable lien, enforceable like other liens, by equitable proceedings only, and foreclosure sale. This lien will be defeated and the mortgagor's legal estate become unencumbered, without need of a re-

[42] Pomeroy, Equity Jurisprudence, § 1187; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, H. & B. 557; Shields v. Lozear, 34 N. J. L. 496, 3 Am. Rep. 256.

conveyance—since nothing has been conveyed—by a payment of the debt at any time before foreclosure sale. The mortgagee, having no estate, is not entitled to possession of the land after default; his only remedy is to sue at law to recover the mortgage debt, or in equity for a foreclosure.[43] By a seeming inconsistency, however,—of no great practical importance—the mortgagee who has lawfully obtained the possession is allowed to retain it until his debt is paid; since it would be rather absurd to allow the mortgagor to eject the mortgagee when the latter might immediately reply with a suit for foreclosure.[44]

151. **Foreclosure by sale.**—The English method of foreclosure—by cutting off the mortgagor's equity of redemption and then leaving the mortgagee's legal estate absolute and free from claim, is called strict foreclosure, and is rarely adopted in this country: in the lien theory states, indeed, it would be wholly inconsistent with the theory of the mortgage there prevailing. Instead, we have foreclosure by judicial sale—the common way of enforcing all equitable liens. The court, after ascertaining the amount due upon the mortgage, orders a public sale of the premises. This sale passes to the purchaser thereat whatever title the mortgagor had at the time he executed the mortgage. If the property does not yield enough to pay the amount due, the difference, or deficiency, may be collected by means of a per-

[43] Pomeroy, Equity Jurisprudence, §§ 1188-1190. Also see cases, McMillan v. Richards, 9 Cal. 365, 407, 70 Am. Dec. 655; Chick v. Willetts, 2 Kan. 384, 391, LEADING ILLUSTRATIVE CASES; Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

[44] Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519.

sonal judgment in the same suit against the mortgagor or other party liable for the debt. If the sale yields a surplus after paying the amount due to the mortgagee, and expenses, the court orders this surplus to be paid to the mortgagor or to any other party—for example, a judgment creditor of the mortgagor—who may have a claim superior to the mortgagor.[45]

152. **When deeds are treated as mortgages.**—A mortgage, in equity, is a mere security for a debt; conversely, any deed that is intended by the parties merely as security for a debt will be treated in equity as a mortgage, no matter what its form. A conveys land to B: at the same time B agrees in writing that he will reconvey the land to A if A shall pay to B $5,000 at or before a certain date. Is this a transaction, a mortgage, or only what it appears to be on its face—a conveyance with an option to repurchase, which like all options must be exercised within the time specified?[46] The test to determine the question is, does A owe B $5,000, which B might sue A for in an action at law, and was this transaction intended as security for its payment? If it appears by the evidence that such was the case, the transaction, despite its form, is a mortgage, and A has the mortgagor's right to redeem after the specified date.[47] Even an absolute deed, without any writing giving the grantor a right to reconveyance, will be treated as a mortgage, if it was intended by the parties as

[45] Pomeroy, Equity Jurisprudence, § 1228.

[46] See § 26.

[47] Russell v. Southard, 12 How. 139 (U. S.), 13 L. Ed. 927; compare Coyle v. Davis, 116 U. S. 108, 6 Sup. Ct. 314.

security for a debt actually subsisting. The parties deliberately have chosen a deed to carry out their purpose, without any deception or imposition practiced by the grantee: the latter's fraud, in the view of equity, consists in attempting to make an unconscientious use of the legal title which he has obtained.[48] To guard against the danger of dissatisfied grantors attempting to have their deeds construed to be mortgages, the courts demand convincing proof that the deed was intended as security—was other than what it purported to be. We have in this doctrine, as in the doctrine relating to part performance of oral contracts, a bold application of the principle that the Statute of Frauds shall not be an instrument for committing a fraud.

153. **Conveyance of the mortgaged premises.**—The estate of the mortgagor, whether legal or equitable, may be conveyed by him to a third party, and, of course, the land still remain burdened with the mortgage. Now, suppose the land is not of sufficient value, when sold on foreclosure, to pay off the mortgage; it then becomes important to know who is liable for the mortgage debt. A, the mortgagor, of course remains personally liable to B, the mortgagee; he cannot rid himself of the responsibility by conveying the land to another. How about the grantee, C? If in the conveyance from A to C, the latter assumes payment of the mortgage, then C, as well as A, is liable to the holder of the mortgage. Further, by agreeing with A to pay the debt, C, as

[48] Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Stinchfield v. Milliken, 71 Me. 567, H. & B. 347; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

between these two, is primarily liable. The situation is, practically, that of suretyship. B, the creditor, may hold either A or C for the debt, at his option—C is primarily liable, A secondarily liable. A, therefore, occupies the position of surety, C that of principal debtor. Many of the incidents of the suretyship relation are involved. Thus, if B, the creditor, makes a binding agreement with C, the principal debtor, extending the time for payment, this, in accordance with a rule of the law of suretyship, discharges A from his liability.[49] The liability of C to B, the creditor-mortgagee, is based, in most states, on the rule that a contract by C with A for the benefit of B may be sued upon by B. This liability then, in these states, is a legal one; the mortgagee may, if he choose, sue C at law on his promise to assume the mortgage debt.[50] In other states C's liability is one recognized by equity alone, enforceable in the foreclosure suit.[51]

154. **Assignment of the mortgage.**—Since the mortgagee's interest in equity (or according to the lien theory states, his interest both in equity and in law) is a mere lien, and not an estate, it follows that it may be transferred without the formalities requisite for a conveyance of land. The conception that the mortgage is a mere security for the debt is carried out to its logical conclusion. Since the debt is the principal thing, an assignment of the debt

[49] Calvo v. Davies, 73 N. Y. 211, 215, 29 Am. Rep. 130; Union Mut. Life Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Pomeroy, Equity Jurisprudence, § 1206.

[50] McKay v. Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

[51] Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

carries with it the incident of the debt—viz.: the security. Thus, if B, the mortgagee, assigns to D the mortgage note, but retains in his possession the mortgaged instrument, the beneficial use of the mortgage likewise passes to D. When the debt falls due, D may foreclose, treat B as trustee of the mortgage for his benefit, make B a party to the foreclosure suit, and have the full benefit of the mortgage. If B were to assign the note to D and the mortgage instrument to E, the same result would follow: E would take nothing of substantial value, but would hold the mortgage for D's benefit. Most American states go still further. Suppose the mortgage secures a promissory note, and this note is subject to some defense, e. g., fraud, so long as it is in the hands of the original payee, B. B, of course, by indorsing the note to a bona fide purchaser, D, for value and before maturity, confers on D a title to the note free from such defense; by the cardinal rule of the law of negotiable paper, A, the maker, cannot set up against D the defense that he might have set up against B. Now the prevailing rule applies the same element of negotiability to the mortgage which secures the note. D, in the case supposed, cannot only sue on the note, but may foreclose the mortgage, free from A's defenses which would have been available against B.[52] This rule, by which a mortgage securing a negotiable note itself becomes a species of negotiable instrument, was not established without protest, and is still denied in a few states.[53]

[52] Carpenter v. Longan, 16 Wall. 271 (U. S.), 21 L. Ed. 313.

[53] Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Pomeroy, Equity Jurisprudence, § 1210, note.

155. No mortgage without right of redemption. —Not long after the courts of equity invented the equity of redemption, they were called upon to defend it by the further rule that the mortgagor cannot, when he executes the instrument, bargain away, either wholly or partially, his right of redemption. Thus, if A, the mortgagor, stipulates in the mortgage that he shall have no right to redeem after the pay day; or that his heirs may redeem but his assigns may not;[54] or that the mortgagee may have the option to buy an absolute title on payment of a bonus and thus cut off the equity of redemption; all such stipulations limiting the right of redemption are wholly void.[55] The reason is plain; if such stipulations were permitted to have effect, they would come into common use, and thus the entire system of equity mortgage law would in practice be destroyed and the mediaeval common law system restored in full vigor. This doctrine is expressed in the sentence, "Once a mortgage, always a mortgage." The wording of this maxim is somewhat misleading; in place of "always," it were better to read, "in all respects" a mortgage. For, on the other hand, it is quite legitimate for the mortgagor, by an independent transaction, after the mortgage is executed, to sell his equity of redemption to the mortgagee.[56] Such a sale, however, will be closely scrutinized by a court of equity and will not be permitted to stand unless it is perfectly fair; since the mortgagee, while

[54] Howard v. Harris, 1 Vern. 33 (Eng.).

[55] Noakes & Co. Ltd. v. Rice, (1902) App. Cas. 24 (Eng.), LEADING ILLUSTRATIVE CASES.

[56] Pritchard v. Elton, 38 Conn. 434.

not in a strict fiduciary relation with the mortgagor, is in a position to take advantage of his necessities and to exert undue pressure upon him.[57]

156. **Who may redeem from the mortgage.**—The mortgagor or his heir, devisee, or grantee of the land, may, as we have seen, redeem,—i. e., buy back the land,—if necessary, by a suit in equity for the purpose—at any time before foreclosure sale. The same right of redemption extends to any person who has an interest in the land to protect: such as the mortgagor's widow, his grantee of a portion of the land, subsequent mortgagees or judgment creditors, and the like. The mortgage, however, cannot be redeemed by piecemeal, against the mortgagee's consent. If C has an interest worth $100 in land subject to a prior mortgage of $1,000 C can free his interest from the mortgage only by paying the whole mortgage debt;[58] and he cannot compel the mortgagor or holders of other interests to contribute to the burden of redeeming.[59]

157. **Subrogation.**—The last rule would seem to be a hardship on persons who wish to protect a comparatively small interest in the land. Suppose C owns a one-third interest in land, there being a $3,000 mortgage on the whole land, made by A, mortgagor, to B, mortgagee. We have just seen that to avoid foreclosure, C must pay off the whole mortgage. Now it is obviously just that he should have some right of contribution against A, whom he

[57] Villa v. Rodriguez, 12 Wall. 323 (U. S.), 20 L. Ed. 406.

[58] Gibson v. Crehore, 5 Pick. 146 (Mass.); McGough v. Sweetser, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470.

[59] Pomeroy, Equity Jurisprudence, § 1220.

has just benefited to the extent of $2,000. Must C be confined to a personal action against A, and take his chances with A's other creditors? Equity has invented an ingenious piece of legal machinery to meet this emergency. C, by his payment, in self defense, of A's $2,000 debt, becomes "subrogated," —i. e., substituted—to all the original remedies and securities which the creditor, B, held against A. Although the mortgage is paid off and legally discharged, equity keeps it alive for C's benefit to the extent of his claim: C, in effect, becomes an equitable assignee of the mortgage and may foreclose against A for $2,000.[60]

Again, take the case where C, the grantee of the mortgagor, A, assumed the mortgage debt. C, as we have seen, is now the party primarily liable for the debt, and A is surety. Now if the mortgagee collects the debt from A, A may demand that the mortgage be kept alive for his benefit, so that he may foreclose and thus secure his reimbursement by C, the principal debtor.[61]

158. **Same subject.**—This principle of subrogation, by which a person paying off another's debt is entitled (with some limitations) to the benefit of the creditor's securities, is of wide application, and is not confined to the law of mortgages. As in the second example given, it applies to all persons secondarily liable for a debt or duty—such as sureties—who discharge the debt or duty in place of the one

[60] Ellsworth v. Lockwood, 42 N. Y. 89, 97.

[61] Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315.

primarily liable.[62] As in the first example, it applies to persons who, though not legally bound to pay, are obliged to pay in order to protect their own interest. It also applies where a person under no legal or practical compulsion pays off the debt at the request of the debtor; he also succeeds by subrogation to the benefit of the creditor's mortgage or other security.[63] It does not apply, however, to the mere volunteer or intermeddler. One who has no interest to protect or duty to perform cannot, by his unsolicited favor to the debtor party, become entitled to the benefit of subrogation.[64]

159. **Marshalling of securities.**—The maxim, "He who seeks equity must do equity," applies in foreclosure suits as in other equitable remedies. In particular, the mortgagee or lien holder will not be permitted to exercise his right to foreclose in such a way as to inflict a needless or wanton injury upon third persons. Suppose A has mortgaged to B, for $1,000, two parcels: X, worth $1,200, and Y, worth $1,000. Afterwards A mortgages parcel X to C for $800. Now if B is permitted to enforce his mortgage by a sale of X alone, there will not be enough surplus to satisfy C's mortgage. If, then, it is just as convenient for B to get satisfaction out of parcel Y, he will not be permitted to go against X until Y is used up. If B does sell X first, to the exclusion

[62] Darrow v. Summerhill, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833; Pace v. Pace's Administrator, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459 (subrogation of surety against co-surety).

[63] Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Crippen v. Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

[64] Pomeroy, Equity Jurisprudence, § 1212.

of C, the latter will be substituted or subrogated to B's rights against parcel Y, and thus get payment in full. B, of course, being the prior lien holder, must not be deprived of his right to get satisfaction in full from one parcel or the other.[65]

160. **Foreclosure where land has been sold in successive parcels.**—A very common situation arises when the mortgaged land has been divided up into lots, and these lots sold, at different times, to different purchasers. A, having mortgaged land divided into four lots to B, sells lot No. 1 to C and retains the rest. Now if the sale to C was by warranty deed, that amounts to an agreement between A and C that the land retained by A—lots 2, 3 and 4—should bear the mortgage rather than lot 1 which is sold. A now sells lot 2 to D in a similar way. The result of the two transactions is, that the lots now retained by A, Nos. 3 and 4, should bear the mortgage first, then lot 2, then lot 1. So, when all the lots are sold, in the order 1, 2, 3, 4, they are liable for the mortgage, when the rights of all the parties come to be finally adjusted, in the order 4, 3, 2, 1,—the opposite or inverse order of the sale. This is the "inverse order of alienation" rule. If the mortgagee is in no way delayed or impeded in the collection of his debt thereby, he must follow this inverse order in conducting the foreclosure sale. If he does not—if for example he gets satisfaction from 4, 3 and 1, when 4, 3, and 2 would have answered his purpose

[65] Aldrich v. Cooper, 8 Ves. 382, 395 (Eng.); Wyman v. Fort Dearborn National Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 48 L. R. A. 565, 54 N. E. 946; Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579.

as well, the owner of 2 may be compelled to make good the loss to the owner of 1.[66]

[66] Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151; Howser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76.

CHAPTER XI.

EQUITABLE LIENS—ASSIGNMENTS.

161. **Equitable liens.**—It has been stated[67] that the mortgage, in many states, is looked upon as creating an equitable lien merely. An equitable lien has nothing in common with a common law lien, except that each is a form of securing the payment of a debt or performance of a duty. A common law lien is a right to retain possession of a chattel for such purpose. The holder of an equitable lien, on the contrary, has no right of possession. His right is to bring an equitable suit which results in a judicial sale of the land or chattel for the purpose of satisfying his demands. Like a trust or other equitable right over property, it remains attached to the property until the latter comes into the hands of a bona fide purchaser for value without notice. Also, the lien holder's demand being a secured claim, it must be paid from the proceeds of the foreclosure sale of the property in preference to the claims of unsecured creditors.[68]

162. **Equitable liens, how created.**—An equitable lien is created by any express agreement in writing that designated property shall be security for a debt or obligation; or in cases of personal property, the lien may be created orally.[69] The form of the agreement is immaterial. An agreement to give a mort-

[67] See § 150; Davis v. Clay, 2 Mo. 130, LEADING ILLUSTRATIVE CASES.

[68] Pomeroy, Equity Jurisprudence, §§ 1233, 1234.

[69] Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Perry v. Board of Missions, 102 N. Y. 99, 6 N. E. 116.

gage creates a lien,[70] just as an agreement to convey land creates an equitable estate in the vendee, in accordance with the maxim, "Equity looks on that as done which ought to be done."[71] A mortgage which is defective in form—which, for example, is unsealed, so that it cannot (in many states) operate as a conveyance of the land, is nevertheless treated as a lien.[72] A lien is also created when specific property is devised or bequeathed by will, charged with the payment of debts or of legacies; the lien so created is usually called a "charge."[73]

163. **Vendor's lien.**—The vendor who has contracted to convey land on payment of the purchase price, as we have already seen, holds the legal title as security for such payment. This is sometimes called the vendor's lien; but his situation is more like that of the English mortgagee, as he has the legal title. He may have foreclosure;[74] his rights are assignable; and if he assigns the notes given for the purchase price, this assignment carries with it the security of the lien,[75] just as the assignment of a mortgage note operates to assign the benefit of the mortgage.

164. **The vendor's or grantor's lien after conveyance.**—The vendor's hold upon the land, by way of

[70] Daggett v. Rankin, 31 Cal. 321.

[71] See §§ 36, 227.

[72] Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544, 1 Scott, Cases on Equity, p. 308.

[73] Clift v. Moses, 116 N. Y. 144, 22 N. E. 393.

[74] Button v. Schroyer, 5 Wis. 598, 1 Ames, Equity Jurisdiction Cases, p. 225; Lewis v. Hawkins, 23 Wall. 119 (U. S.), H. & B. 665.

[75] Graham v. McCampbell, Meigs 52 (Tenn.), 33 Am. Dec. 126, 1 Ames, Equity Jurisdiction Cases, p. 205. See §§ 37, 154.

lien, is not necessarily at an end when he has conveyed the land to the vendee. In England and in half the states the vendor—now become a grantor—who has not received full payment of the purchase price has a lien, implied by equity, to secure such payment. This lien is also generally called the vendor's lien, but it is so different in all respects from the lien mentioned in the last paragraph that it should receive a different name. Since it is a secret lien, not declared in the deed but implied from the fact that the purchase price has not been paid, it has received scant favor from the courts: has been subject to many arbitrary restrictions, and in half the states has been rejected by the courts or legislatures. In those states where it exists, however, it is of great practical importance.[76]

165. **Same subject.**—On nearly every proposition that has been advanced with respect to this lien there is a difference of opinion in the various states. The following rules, however, are supported by the majority in each instance. The grantor may readily lose or waive the lien by taking other security, even though that security turns out to be worthless.[77] It is waived, for example, by his taking a mortgage from the grantee,[78] or by taking the note or bond of a third person, or the grantee's note indorsed by a third person.[79] The lien does not exist to secure any claim other than a certain and definite

[76] For the various theories on which this lien has been rested, see Pomeroy, Equity Jurisprudence, § 1250.

[77] Kendrick v. Eggleston, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786.

[78] Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

[79] Rice v. Rice, 36 Fed. 858.

amount due as purchase price; for instance, where the grantor conveys land on consideration that the grantee shall support him for the rest of his life (a very common transaction), there is no lien implied to secure the performance of the grantee's promise, or damages for its breach.[80] The lien is personal to the grantor, according to the prevailing view: that is to say, it cannot, like a mortgage or other lien, be assigned: it does not pass on assignment of the debt, and a person paying it off is not entitled to be subrogated to the lien.[81] Like other liens, however, it is good against a purchaser from the grantee who has notice of the lien, or against volunteers,—i. e., the grantee's heirs, devisees, or donees.[82]

166. **Grantor's reserved lien.**—In a good many states it is a common practice to stipulate in the deed that the grantor has a lien for the purchase price. Such lien resembles an ordinary lien, or the mortgage in a lien-theory state; it is not subject to the rules which restrict the operation of the grantor's implied lien. It is not waived merely by taking other security; it may be assigned, and passes on assignment of the purchase money note.[83]

167. **Summary—Methods of securing purchase price of land.**—There are, then, four methods in common use of securing the purchase price of land: 1. The vendor may convey and take back a purchase

[80] Peters v. Tunell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

[81] Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Wellborn v. Williams, 9 Ga. 86, 52 Am. Dec. 427.

[82] Mackreth v. Symmons, 15 Ves. 329 (Eng.), 1 Scott, Cases on Equity, p. 71; Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57.

[83] Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829. See Pomeroy, Equity Jurisprudence, §§ 1255-1259.

money mortgage. 2. He may retain the legal title, his situation then resembling the English mortgagee. 3. He may convey and reserve a lien in the deed: he then resembles the mortgagee in the lien-theory states. 4. He may convey and, in half the states, rely on the lien which equity raises for his benefit.

168. **Equitable interests arising from assignments.**—In the earlier days of its history, equity had an important jurisdiction growing out of the assignment of ordinary choses in action; but as the validity of such assignments has long been recognized by the law courts, this jurisdiction is now obsolete. Certain species of assignments, however, are still within the exclusive domain of equity. Thus, A is holding a fund that belongs to B. B gives to C an order upon A for the fund, or part of it. At law, unless A gives his assent to this order and promises to pay, C can maintain no action against A. Equity, however, holds that by giving the order or making the assignment, B has transferred a property right in the fund to C, which C may now enforce by suit in equity against A, independently of any assent by A.[84]

169. **Assignment of future interests.**—At common law, the power to make a transfer of future interests in land which should operate to convey the title, and not merely as a contract to convey, was very limited; and the power to make a sale of personal property not yet acquired was almost nonexistent. The attitude of equity in those matters

[84] Pomeroy, Equity Jurisprudence, §§ 1280-1284; Row v. Dawson, 1 Ves. Sr. 331 (Eng.); Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 315; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

was, and is, very liberal. A, the heir of B, expects to inherit B's land on the latter's death. This is a mere hope, or expectancy (as it is technically called) and not a legal or equitable interest of any kind; for B, of course, is at liberty to disinherit A if he sees fit. A present transfer by A to C of this expectancy will not, on B's death, pass any legal title to C. It will, however, if on an adequate consideration, pass a title to C, on B's death, which equity will recognize, and which equity will enforce by compelling A to convey to C the legal estate.[85] Similarly, one who expects to receive a devise or legacy under the will of a person still living, may make a present transfer thereof which will take effect in equity, but not at law, upon the death of the testator.[86]

170. **Sale or mortgage of after acquired personal property.**—A sale of chattels which the vendor does not own passes no property in the chattels at common law when the vendor subsequently acquires them. In equity, however, effect will be given to such sale. A mortgage on chattels not yet acquired confers an equitable lien upon the mortgagee as soon as the chattels come into the ownership of the mortgagor.[87] So, also, with a mortgage of the future rolling stock of a railroad.[88] The as-

[85] Hobson v. Trevor, 2 P. Wms. 191 (Eng.), 1 Scott, Cases on Equity, p. 75; In re Garcelon's Estate, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595, 1 Scott, Cases on Equity, p. 77.

[86] In re Wilson's Estate, 2 Pa. St. 325.

[87] Holroyd v. Marshall, 10 H. L. Cas. 191 (Eng.); Smithurst v. Edmunds, 14 N. J. Eq. 408. This rule, however, has been a good deal cut into in many states by the chattel mortgage acts, designed for the protection of creditors of the mortgagor.

[88] Morrill v. Noyes, 56 Me. 458, 471, 96 Am. Dec. 486.

signment of wages to be earned under an existing employment[89] or of payments to become due under an existing contract,[90] passes an interest which will be enforced in equity.

[89] Mallin v. Wenham, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564.

[90] Ruple v. Bindley, 91 Pa. St. 296. See, also, Tailby v. Official Receiver, L. R. 13 App. Cas. 523 (Eng.).

PART III

GENERAL PRINCIPLES AND DOCTRINES OF EQUITY

CHAPTER XII.

DOCTRINES RELATING TO ACCIDENT, MISTAKE, AND FRAUD.

171. **Accident, mistake, and fraud.**—In discussing equitable remedies and equitable rights of property or rights analogous to property, we have frequently had occasion to refer to fraud[91] as giving rise to various equitable remedies—such as cancellation, reformation, injunction—or to constructive trusts. We have also referred to mistake[92] and accident.[93] These three things—fraud, mistake, and accident—frequently are the occasion for legal remedies; the remedies by which equity copes with them, however, are more numerous and efficient. The equitable conception of fraud is very much broader than the meaning attached to the word by the common law, and requires some explanation. Mistake has, perhaps, already been sufficiently illustrated. The topic of accident is of limited importance, and may be disposed of briefly.

172. **Accident.**—Equity takes jurisdiction, within somewhat narrow limits, to relieve a person who

[91] See §§ 65, 66, 68, 73, 78, 80, 64, etc.
[92] See §§ 67-81.
[93] See § 64.

has incurred a legal loss or liability through accident, without fault or negligence on his own part. A conspicuous instance, already noted, is that of a judgment obtained against a defendant who was prevented by accident from setting up a good defense.[94] Another instance is that of a forfeiture incurred by accident.[95] In general, however, if a party fails to perform a contract because of an unavoidable accident, neither law nor equity will relieve him from the consequences; he should have guarded against the possibility of accident by an express stipulation in the contract.[96] Probably the most common of the few instances of the jurisdiction is the suit in equity to recover the amount due on a written instrument that is lost or destroyed. This suit arose from the facts that the common law procedure, in an action on a bond or sealed instrument, required the instrument to be produced; while an action on a negotiable instrument—a bill, note, or check—which had been lost could not be maintained, because the common law procedure provided no machinery for indemnifying the defendant in case he should be obliged to pay a second time. The equity procedure was not subject to these defects. Jurisdiction to recover on lost sealed or negotiable instruments in equity became well established;[97] and, by the weight of authority, has been extended to lost written in-

[94] See § 64.

[95] See § 190; Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, H. & B. 166, 1 Scott, Cases on Equity, p. 400.

[96] Pomeroy, Equity Jurisprudence, § 826.

[97] Ex parte Greenway, 6 Ves. 812 (Eng.), 1 Scott, Cases on Equity, p. 413; Patton v. Campbell, 70 Ill. 72, H. & B. 171; Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373.

struments that are neither sealed nor negotiable.[98] The defects in the common law procedure have been remedied by statute, so that actions may now be brought on lost or destroyed instruments; but the remedy in equity still remains, in accordance with the principle that a jurisdiction in equity which has once existed is not lost because courts of law have acquired power to entertain actions for similar relief.[99]

173. **Fraud, actual and constructive.**—A famous classification of frauds in equity was made by the great Chancellor, Lord Hardwicke, in the eighteenth century.[1] He divided frauds into four forms: 1. Actual frauds or impositions, which again may be subdivided into false representations and concealments. 2. Frauds apparent from the nature of the bargain or transaction. 3. Frauds presumed from the circumstances of the parties. 4. Frauds on third persons not parties to the transaction. The last three are called by the somewhat vague term, constructive frauds. The last class is made up of frauds on creditors; inasmuch as the definition of such frauds is very much the same in equity as in law, we may dismiss this class with the reminder that the creditors' bill is the usual remedy for coping with them.[2] The elements which go to make up the false representations which will be a ground in equity for rescission or cancellation, or a defense to specific performance, are also practically the same as at com-

[98] Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040.

[99] See § 231.

[1] Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125 (Eng.), 1 Atk. 301, 1 Scott, Cases on Equity, p. 455.

[2] See § 96.

mon law, with one very important exception. As at law, the false representation must be a statement of a fact, not the expression of an opinion; made with the intention or expectation that it be acted upon; must be material; that is, must result in damage to the other party; while the other party must have relied upon it, and not upon his own information.[3] The great point of difference, as has already been pointed out, is that the misrepresentation may be a ground for relief in equity though it was entirely innocent—though the party making it had full belief in its truth. His fraud or moral culpability, in equity, consists in seeking to retain the advantage gained by his false representation after discovering its untruth.[4]

174. **Concealment and non-disclosure.**—The mere fact that a party entering into a contract fails to disclose facts, known to him but unknown to the other party, which make the contract advantageous to him, is not (with few exceptions) a ground for setting aside the contract in equity any more than it is ground for damages at law.[5] A vendor who knows of facts rendering the thing sold worth less than the price offered, or a vendee who knows of facts rendering it more valuable, may—if the parties are dealing at arms' length—keep his own counsel; he is under no legal or equitable duty to disclose his

[3] Pomeroy, Equity Jurisprudence, §§ 876-883, 890-898.

[4] See § 19; Summers v. Griffiths, 35 Beav. 27 (Eng.), LEADING ILLUSTRATIVE CASES.

[5] Harris v. Tyson, 24 Pa. St. 347, 3 Keener, Equity Jurisdiction Cases, p. 561; People's Bank v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener, Equity Jurisdiction Cases, p. 575; Mitchell v. McDougall, 62 Ill. 498, H. & B. 279.

secret knowledge. To be sure, his failure to disclose has frequently been held a defense to specific performance by American courts;[6] but that particular remedy is one in which somewhat higher standards of conduct are required by the courts than are demanded by ordinary business ethics. The rule is otherwise if the party does more than keep silent—if he takes active measures to conceal the truth, or suppress the other's means of information, or even by trick or stratagem distracts the other's attention from the real facts; he is then guilty of fraudulent concealment, which is indistinguishable in its legal effects from fraudulent statements.[7] *Aliud est celare, aliud tacere,* says the Latin maxim: it is one thing to conceal, another thing to keep silent.

175. **Same subject—Non-disclosure by fiduciaries.**—The rule is far otherwise in transactions between fiduciaries. It is of the very essence of a fiduciary relation that it must be characterized by the utmost good faith in the dealings between the parties. It is the duty, therefore, of a trustee dealing with his beneficiary, or an attorney with his client, or a confidential agent with his principal, or a guardian with his ward, to make the fullest and frankest disclosure of all facts known to him, bearing upon the transaction, which would make it advantageous to him or disadvantageous to the other. Such fiduciary relations, in order to impose this duty, need not be of a permanent or general char-

[6] See § 20.

[7] Coaks v. Boswell, L. R. 11 App. Cas. 232 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 596.

acter; the parties may occupy a position of trust and confidence solely for the purpose of the contract or transaction in question.[8]

176. **Inadequacy of consideration.**—Under the head of constructive frauds apparent from the nature of the transaction may logically be included the two topics: contracts upon an inadequate consideration, and transactions which are illegal or against public policy. The latter may conveniently be postponed for the present.

Inadequacy of consideration, pure and simple, as we have seen, is no defense to specific performance; much less is it a ground for setting aside a contract that has been performed.[9] A man cannot rid himself of his bargain, either in equity or in law, simply because it is a bad bargain. The cases all agree, however, that inadequacy of consideration (if the transaction was not a gift) may, if very gross, be of itself convincing evidence of fraud.[10] If a man sells land worth $10,000 to a stranger for $100, and it is certain that no gift or benefaction was intended, and there is no evidence one way or the other of the circumstances of the transaction, the court is at liberty to draw the inference of fact that the vendor was defrauded or imposed upon, and hence may set the

[8] Tate v. Williamson, L. R. 1 Eq. 528 (Eng.), 2 Ch. 55, H. & B. 337; Dolman v. Nokes, 22 Beav. 402 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 565; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404, 3 Keener, Equity Jurisdiction Cases, p. 571; People's Bank v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener, Equity Jurisdiction Cases, p. 575.

[9] Seymour v. Delancey, 3 Cow. 445 (N. Y.), 15 Am. Dec. 270, 2 Keener, Equity Jurisdiction Cases, p. 772; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9, H. & B. 308. See § 18.

[10] Coles v. Trecothick, 9 Ves. 234, 246 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 768; Falcke v. Gray, 4 Drew. 651 (Eng.), H. & B. 655.

sale aside. It must be admitted that cases in which inadequacy of consideration alone, without any other inequitable element, has been the ground of relief, are in practice exceedingly rare. Usually we find something in the circumstances or condition of the parties which tends to render the transaction suspicious—such as mental weakness, ignorance, undue influence. Such additional facts, when combined with inadequacy of consideration, easily induce the court of equity to grant its relief to the party of whom advantage is taken.[11]

177. **Persons wholly or partially incompetent.**—Instances of fraud presumed by equity from the circumstances of the parties are very numerous. The incompetency of married women and of infants to contract is governed in equity by the same rules as those at common law, with the exception of the married woman's contracts relating to her separate estate.[12] The same may be said of the rules defining insanity and idiocy. As in the law of wills, there may be a degree of mental weakness, not amounting to insanity or idiocy, which of itself will incapacitate a party in equity.[13] A mere deficiency in mental ability does not necessarily invalidate a transaction if the party had sufficient intelligence to understand the nature of his acts;[14] but if such mental deficiency is accompanied by undue influence or other inequitable conduct of the other party, equity will readily set the transac-

[11] See the following paragraphs.
[12] See §§ 140, 141.
[13] Davis v. Cummins, 60 Vt. 502, 11 Atl. 727.
[14] Cowee v. Cornell, 75 N. Y. 91, 99, 31 Am. Rep. 428, H. & B. 316.

tion aside.[15] Even mere illiteracy or ignorance, if unfairly taken advantage of, has sometimes been the ground for setting aside a disadvantageous contract.[16] Intoxication does not necessarily disable a person from contracting. To be sure, if the intoxication is brought about by the other party and taken advantage of by him, the fraud is palpable and will be relieved against.[17] If the intoxication is not thus unfairly produced or used by the other, equity will not set the contract aside, although it was sufficient in degree to cloud the party's judgment;[18] complete intoxication, however, whereby one is wholly deprived of his faculties and disabled from understanding his acts, renders the contract voidable.[19] Persons who have made sacrifices under the pressure of financial or other distress have sometimes been relieved in equity where advantage was taken of their situation to drive a hard bargain, and they acted without an intelligent comprehension of the situation, or under undue pressure.[20]

178. **Expectant heirs and reversions.**—With one class of persons, equity makes the assumption that their contracts are made under the pressure of pecuniary distress. This class is composed of heirs who, during the lives of their ancestors, sell or

[15] Allore v. Jewell, 94 U. S. 506, H. & B. 320.

[16] Fish v. Leser, 69 Ill. 394, H. & B. 650; Green v. Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434.

[17] Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

[18] Harbison v. Lemon, 3 Blackf. 51 (Ind.), 23 Am. Dec. 376.

[19] Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 3 Keener, Equity Jurisdiction Cases, p. 699, 2 Scott, Cases on Equity, p. 746.

[20] Neilson v. McDonald, 6 Johns. Ch. 201 (N. Y.), 3 Keener, Equity Jurisdiction Cases, p. 751.

charge their expectant interests,[21] or of reversioners who similarly deal with their future estates. Such persons are often exposed to great temptation to dispose of their expectant or future interests at a sacrifice. Equity has, therefore, established the general rule, that their contracts with reference thereto are voidable, unless made upon an adequate consideration—unless they receive the full market value of their interests.[22] This is the rule of English equity, which has usually been followed by the comparatively few cases on the subject in this country.

179. **Duress and undue influence.**—Legal duress is a ground for cancellation or other appropriate equitable relief. Acts, also, which fall far short of the legal definition of duress have the same effect, under the heading, undue influence. This has been defined as "pressure of whatever character, whether acting on the fears, or the hopes, if so exerted as to overpower the volition without convincing the judgment." What may amount to undue influence, of course, varies greatly with the circumstances and the individual. Much less may be required to overcome the volition of an aged invalid than of a person in robust health. In practice, then, the subject is bound up with the other matters—particularly mental weakness—which have been mentioned in the foregoing paragraphs.[23]

[21] As to the enforceability of such contracts in equity, see § 169.

[22] Fry v. Lane, L. R. 40 Ch. Div. 312 (Eng.); In re Garcelon's Estate, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

[23] Rau v. Von Zedlitz, 132 Mass. 164, 3 Keener, Equity Jurisdiction Cases, p. 784, 1 Scott, Cases on Equity, p. 487; Hollocher v. Hollocher, 62 Mo. 267; Haydock, Ex'rs. v. Haydock, 33 N. J. Eq. 494, 3 Keener, Equity Jurisdiction Cases, p. 807.

180. **Fiduciary relations—Transaction presumed invalid.**—The undue influence spoken of in the last paragraph was actual; like any other fact, it must be proved by the person wishing to set aside the transaction. Now, if the relation between the parties was a fiduciary one, we have the important rule that every transaction between persons in such a relation, if assailed by the beneficiary or dependent party, is presumed to be invalid; the burden rests upon the trustee or quasi-trustee of proving that the transaction was in all respects fair and equitable, with full knowledge and free consent.[24] If A, a trustee, or quasi-trustee, or other person occupying a position of trust and confidence with reference to B, becomes the purchaser of B's property without B's knowledge or consent, then, obviously, he is unable to overcome the presumption, and the transaction is voidable at B's option, though A may have paid a fair price; and the same is true where A, with power to buy for B, purchases from himself.[25] If the transaction is a gift from B to A, the additional rule is established in England, and followed in many states, that B must be shown to have had the independent advice of a third person, or else the gift may be set aside by B.[26] These rules apply to all manner of fiduciary relations—to that of trustee and beneficiary,[27] of confidential agent and princi-

[24] Ex parte Lacey, 6 Ves. 625, 627 (Eng.); Smith v. Townshend, 27 Md. 368, 92 Am. Dec. 637.

[25] Michoud v. Girod, 4 How. 503 (U. S.); Ex parte Bennett, 10 Ves. 381, 394 (Eng.).

[26] Allcard v. Skinner, 36 Ch. Div. 145, 189 (Eng.); Liles v. Terry, (1895) 2 Q. B. 679 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 827, LEADING ILLUSTRATIVE CASES.

[27] See cases in notes 24 and 25.

pal,[28] of attorney and client,[29] of guardian and ward,[30] of parent and child.[31] Moreover, they are not limited in their application to these well-defined relationships, but extend to all situations where one party in fact occupies a position of trust and confidence with reference to the other, and is therefore exposed to the temptation of exercising undue influence or of making an unfair profit.[32] Such a relation often exists between a son and an aged dependent parent, or between other near relations;[33] between physician and patient;[34] between a pastor or spiritual adviser and a person under his religious influence;[35] between husbands and wives;[36] and partners.[37]

181. **Ratification and acquiescence.**—A right of action to set aside a transaction for actual or constructive fraud may be lost by a ratification. To

[28] Bentley v. Craven, 18 Beav. 75 (Eng.), H. & B. 530; Panama, etc., Tel. Co. v. Indiarubber, etc., Co., L. R. 10 Ch. 515, 526 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 550.

[29] Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 366, H. & B. 343; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842, 3 Keener, Equity Jurisdiction Cases, p. 819.

[30] Allfrey v. Allfrey, 1 Mac. & G. 87 (Eng.), 1 Scott, Cases on Equity, p. 394; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918, 2 Scott, Cases on Equity, p. 703.

[31] Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Carter v. Tice, 120 Ill. 277, 11 N. E. 529.

[32] Tate v. Williamson, L. R. 1 Eq. 528, 2 Ch. 55 (Eng.), H. & B. 337; Wakeman v. Dodd, 27 N. J. Eq. 564.

[33] Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1.

[34] Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110.

[35] Allcard v. Skinner, 36 Ch. Div. 145 (Eng.); Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306 (spiritualist medium).

[36] Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener, Equity Jurisdiction Cases, p. 401; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189.

[37] Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

have this effect, however, the ratification must be with full knowledge of the facts constituting the fraud, and of the party's rights; and in case of undue influence, the influence must have entirely disappeared.[38] Acts or conduct which falls far short of a formal ratification may have the same effect. Conduct which cannot be reconciled with an intention to repudiate, permitting the other party to deal with the property as his own or even a delay for a considerable length of time, after obtaining knowledge of the right to rescind the transaction, may operate as an acquiescence in the wrong, and so defeat the right to rescind.[39]

182. **Illegal contracts—In pari delicto rule.**—It is a maxim both of law and of equity that a party in equal guilt (in pari delicto) with the other party cannot have a remedy against him. If, for instance, A gambles with B, and loses, and promises to pay his loss in money or land, B cannot sue for the money nor have specific performance for the land. Also, if A has already paid the money or conveyed the land, he cannot (unless permitted by statute) recover back the money or sue in equity to cancel the conveyance of the land.[40] The rule, however, is subject to some limitations and exceptions. If A, in the case supposed, has given B his promissory note

[38] Crowe v. Ballard, 3 Brown Ch. 117, 2 Cox 253 (Eng.), 2 Scott, Cases on Equity, p. 759.

[39] De Bussche v. Alt, L. R. 8 Ch. Div. 286, 314 (Eng.). See Pomeroy, Equity Jurisprudence, §§ 881, 917, 964, 965.

[40] Batty v. Chester, 5 Beav. 103 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 849; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728, 2 Scott, Cases on Equity, p. 787; Treadwell v. Torbert, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918.

for the gambling debt, there is danger that this may be transferred to a bona fide purchaser before maturity and that A will thus lose his defense, illegality; or if A has entered into a written agreement, not negotiable, for the payment, there is the possibility of loss of evidence to prove the illegality of the consideration. Cancellation, therefore, will simply have the same result as successfully setting up the defense of illegality in an action at law on the instrument; the better view, therefore, is that the written evidence of an executory illegal contract may be cancelled, if the defense at law to a suit thereon is an inadequate remedy.[41]

183. **Same subject—Parties not in pari delicto.**—Equity may, however, come to the conclusion that one of the parties to the illegal transaction is not as guilty as the other, and that public policy is best promoted by aiding him to set the transaction aside. Thus, of the two parties to a usurious contract, the borrower is considered less to blame than the lender, and may have relief from his contract.[42] Or, one party may have been led into the illegal contract, or compelled to perform it, by the duress, undue influence, or other fraud, actual or constructive, of the other party, and thus, because of his comparative innocence, be entitled to have the contract set aside as against the more guilty party.[43]

[41] McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415; Booker v. Wingo, 29 S. C. 116, 7 S. E. 49.

[42] Bosanquett v. Dashwood, Cas. t. Talb. 38 (Eng.), 2 Scott, Cases on Equity, p. 667; Peters v. Mortimer, 4 Edw. Ch. 279 (N. Y.).

[43] Wright v. Stewart, 130 Fed. 905, 921; Gorringe v. Read, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692.

CHAPTER XIII.

ESTOPPEL—PENALTIES AND FORFEITURES—ELECTION—SATISFACTION.

184. **Certain general principles of equity.**—A number of general principles and doctrines run through the whole domain of equity jurisprudence and regulate the application of all equitable remedies. Most of these principles and doctrines have already been mentioned incidentally. Several of them are cast into the form of maxims. Among the others are the doctrine as to estoppel; as to penalties and forfeitures; as to election and as to satisfaction; and as to notice, priorities, and bona fide purchasers.

185. **Equitable estoppel.**—The conception of equitable estoppel or estoppel by conduct is a familiar one, having been long ago taken over by the common law from equity; but its applications in equity are somewhat broader. On analysis, the idea may be resolved into six elements: 1. There must be a representation as to facts by A, the party estopped; this representation may be by acts, by silence, or by language. 2. The truth as to the facts must be known to A at the time of his representation, or if not known to him, the knowledge must be imputed to him. 3. The truth concerning the facts must be unknown to B, the party claiming that A is estopped, at the time B acted upon A's

representations. 4. The representations must have been made with the expectation that they would be acted upon by B, or in such circumstances that B's acting upon them is a natural consequence. 5. B must act in reliance upon the representations, and 6. As a result of such acts must be in a position where he will suffer loss if A is now permitted to repudiate his representations.[44]

186. **Same subject.**—Let us, with the aid of these rules, analyze the facts of a leading case.[45] One Horn was about to leave his native village to join his son Charles in a distant state. Desiring to evade his creditors, he packed his goods in a freight box, and while driving to the station, answered the inquiries of several persons with the statement that the contents of the box belonged to Charles. Among others, he made this statement to Cole, whom he had no special motive for deceiving, as Cole was not a creditor of his. Cole, however, had a claim against Charles, and in order to enforce the claim, levied attachment on the box in the belief that its contents was the property of Charles. Horn sues Cole for the detention of the goods; defense, that Horn was estopped by his statements. 1. Here we have conduct—language, in this case—representing that the goods belonged to Charles. 2. Horn, of course, knew the truth as to the ownership of the goods. If he had believed them to be his son's, there would have been no estoppel. 3. Cole was ignorant of the ownership; if he had known that the goods belonged to

[44] Pomeroy, Equity Jurisprudence, §§ 805, 808-812.
[45] Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111, H. & B. 101.

Horn, his seizure of them would clearly have been indefensible. 4. The representations were intended to be acted upon by Horn's creditors. He did not, to be sure, expect Cole's action, but that action was one which was naturally to be expected, if Cole were a creditor of Charles. 5. Cole levied his attachment, believing that Horn's statement was true, and 6. Will be liable in damages unless Horn is held to be estopped to deny the truth of the statement.

187. **Applications of equitable estoppel.**—One most important application of the doctrine of estoppel relates to the title of land. If A, being the owner of land, knowingly and without disclosing his title, allows B in good faith to deal with the land as his own—as by purchasing it from another, or loaning money upon it, or erecting valuable improvements upon it—A's title is postponed in equity to B's, so far as it is necessary for B's protection. This particular species of estoppel is not enforced by courts of law.[46] Another application has to do with the effect of delay in asserting one's right to an equitable remedy. If A is entitled to an equitable remedy against B—such as cancellation, or specific performance, or the enforcement of a constructive trust, etc.—and delays so long in asserting it that B concludes that A has waived his right, and therefore changes his position in reliance on the waiver so that he cannot be restored to his former state, A will lose his remedy in equity and be remitted to his

[46] Storrs v. Barker, 6 Johns. Ch. 166 (N. Y.), 10 Am. Dec. 316; Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533. See Pomeroy, Equity Jurisprudence, §§ 807, 818.

remedy at law[47] In fact, the doctrine of laches, by the better opinion, is rested on estoppel—an alteration in the defendant's condition, or a disadvantage in conducting his defense, resulting from the plaintiff's delay.[48]

188. **Penalties and forfeitures.**—The doctrine of equity as to penalties and forfeitures is an application of the maxim, "Equity looks at the intent or substance and not at the form." If A contracts with B to do an act, and stipulates that on his failure he will pay to B a sum of money as a penalty for his non-performance, or will forfeit to B an estate in land, equity considers that the doing of the act was the real purpose of the contract, and the payment of the penalty or the forfeiture of the estate merely a means of securing performance. If, therefore, damages for the non-performance can readily be ascertained, exaction of the penalty will not be permitted; and in many cases the forfeiture will be relieved against and set aside. The doctrine of equity as to penalties has for the most part, been taken up and adopted by the common law; but not the doctrine as to forfeitures. If a party sues in a court of law today to recover a sum of money which is truly a penalty, his recovery will be limited to the damages actually sustained.[49]

189. **Penalties and liquidated damages.**—If A,

[47] Powers' Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, 1 Scott, Cases on Equity, p. 264; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, 3 Keener, Equity Jurisdiction Cases, p. 728.

[48] Chase v. Chase, 20 R. I. 202, 37 Atl. 804; § 224; Pomeroy, Equitable Remedies, § 21, and cases cited.

[49] Pomeroy, Equity Jurisprudence, §§ 433, 434.

owing B $1,000, payable January 1st, stipulates that on failure to pay on that date $1,200 shall be due, the $1,200 is a penalty, and B will be limited to the recovery of $1,000 and interest. A sum of money thus agreed to be paid as security for the payment of a smaller sum is always a penalty.[50] Suppose, however, that A, a builder, agrees to complete a house for B by January 1st, and if the house is not completed by that date, to pay B $25 for each day's delay. If the amount of inconvenience and loss which B will suffer by the delay are hard to estimate, and $25 a day is not an unreasonable compensation therefor, A and B are quite at liberty to agree upon the damages beforehand, and thus avoid the difficulty of proving the actual damage to a jury.[51] Or, A agrees to retire from his business in a certain place and not to engage in it again, in competition to B, and to pay B $100 for each violation of the agreement. The actual damage that B will suffer by A's competition is very difficult or impossible to ascertain; this $100, therefore, is not a penalty.[52] Sums of money, agreed upon in a contract as damages for a breach, where the actual damage is uncertain or hard to estimate, are called "liquidated damages," and such agreements are perfectly valid, both in law and in equity.[53] If the act secured by

[50] Gay Manufacturing Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134; Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676.

[51] De Graff, etc., Co. v Wickham, 89 Iowa 720, 52 N. W. 503.

[52] Green v. Price, 13 M. & W. 695 (Eng.); Jaquith v. Hudson, 5 Mich. 123, H. & B. 62.

[53] Keeble v. Keeble, 85 Ala. 552, 5 South. 149, H. & B. 68; Wallis Iron Works v. Monmouth Park Ass'n, 55 N. J. L. 132, 26 Atl. 140, 39 Am. St. Rep. 626, 19 L. R. A. 456.

the fixed payment is one which, if not performed, readily admits of compensation, the sum fixed is a penalty. Whether the contract calls the payment a "penalty" or "liquidated damages" is of slight importance in determining its true nature.[54]

190. **Forfeitures.**—Equity will not make a decree which has the result of enforcing a forfeiture. This rule is practically universal.[55] Equity, also, very often takes jurisdiction to relieve a party against a forfeiture not wilfully incurred; but it is difficult to formulate precise rules which shall reconcile the decisions on this subject. When the forfeiture was intended merely to enforce the payment of a sum of money—for example, a condition making void a lease on account of non-payment of rent—the forfeiture will be set aside on payment of the amount due.[56] The whole equity system of doctrines relating to mortgages is a development of this rule. Also, if the forfeiture was occasioned by fraud, or by unavoidable accident, or other similar cause affording a distinct ground for equitable relief, equity will intervene.[57] On the other hand, where the contract containing the forfeiture is one in which a provision for liquidated damages would be valid—the breach being difficult to compensate—the forfeiture will

[54] Cushing v. Drew, 97 Mass. 445; Kunkle v. Wherry, 189 Pa. St. 198, 42 Atl. 112, 69 Am. St. Rep. 802, H. & B. 61.

[55] Craig v. Hukill, 37 W. Va. 250, 16 S. E. 363, H. & B. 60; Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251.

[56] Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657.

[57] Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. St. Rep. 742, H. & B. 166, 1 Scott, Cases on Equity, p. 400; Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323.

stand; the parties merely having fixed their damages in that form;[58] but this rule is subordinate to the one just stated. It cannot be said, however, that a forfeiture will be set aside in every case in which a penalty would be relieved against. Though the contract is one which easily admits of exact compensation for its breach, equity will not necessarily relieve against a forfeiture therein. Whether or not relief should be given in such cases seems to be largely a matter of discretion.[59]

191. **The doctrine of election.**—A made a will by which he bequeathed to B a debt of $5,000 which B owed to A; and devised and bequeathed all the rest of his property to C. Now, it appears that B owed no debt to A at the time of the will or later; but B had owed a debt of $5,000 to A, evidenced by a note and mortgage which A had transferred to C, so that it is now C's property. A, of course, cannot make a disposition of C's property which will be binding on C. C may, if he chooses, retain his property—in this case, his $5,000 mortgage against B. But, if he decides to do this, it is only fair to B and to the testator that he should not claim the whole of the property which A gave him and which A had a right to dispose of. If he claims a benefit under A's will, he must be willing to do equity, and make compensation to B for the loss of the benefit which A de-

[58] Croft v. Goldsmid, 24 Beav. 312 (Eng.); Klein v. New York Life Insurance Co., 104 U. S. 88.

[59] Willson v. Mayor, etc., of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774 (relief given); Tennessee Manufacturing Co. v. James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211 (no relief given); 1 Pomeroy, Equity Jurisprudence (3d ed.), §§ 450, 456, and cases cited.

signed B to have. Or, C may prefer to accept the terms of the will exactly as it stands. In that case he will be compelled, if necessary, to execute a conveyance of his property which A has willed to B.[60] The rule is the same if C's property which A devises to B is real estate—Blackacre. C, if he elects to retain Blackacre, can claim a benefit under the will only on condition that he compensates B by paying him the value of Blackacre. Or, if C elects to accept the will as it stands, he must convey Blackacre to B in accordance with the will's directions. The doctrine, then, is that when a donor, by an instrument—almost always a will—gives to C a benefit and at the same time disposes of C's property to B, C may elect to take either against or under the instrument; if he takes against the instrument he can receive a benefit therefrom only on condition of compensating B for his disappointment.[61]

192. **Same subject—Donor has a partial interest.** —Suppose the donor, A, gives to B property which he describes as "my farm," and it happens that C —who also receives $10,000 under the instrument— owns a part of the property that A operates as his farm. The question will then arise, is C put to any election? Did A mean to give to B the part that was his own property—the only part that he could accurately describe by the word "my"; in which case, of course, C retains his part and also takes the $10,000; or did A mean by the words "my farm" to describe the whole property that he operated—

[60] Fithugh v. Hubbard, 41 Ark. 64, H. & B. 128.
[61] Pomeroy, Equity Jurisprudence, §§ 462-472, 476-486.

both his own part and C's part; in which case C, on electing to retain his part, must compensate B for the latter's disappointment out of the $10,000. If there is any doubt on the subject, the courts lean very strongly in favor of the former answer—that the testator meant to dispose of his own property only, so that there is no election by C. If, however, the language used can only be fairly interpreted as a description of the whole estate, A's and C's parts together, the latter solution must be accepted, and C be put to an election; as in a case where the estate belonged partly to A and partly to C, his wife, and was generally called as a whole, the "Home farm," and was so described in A's will.[62]

193. **Same subject—Election by widow as to dower.**—By far the commonest example of the situation described in the last paragraph is that where C is the widow of A, having a dower right in his lands. The rule of equity was well settled, that C was entitled to her dower in addition to the gifts conferred upon her by the will, unless the gifts were made expressly in lieu of dower, or unless the dispositions made by the will were plainly inconsistent with the allotment of dower to C in A's lands.[63] Thus, a devise of the lands in trust to be sold was taken to mean that the lands were to be sold subject to the widow's dower therein.[64] Statutes in many states have changed this rule, and, strangely

[62] Penn v. Guggenheimer, 76 Va. 839, H. & B. 123.

[63] Adsit v. Adsit, 2 Johns. Ch. 448 (N. Y.), 7 Am. Dec. 539; Herbert v. Wren, 7 Cranch 370 (U. S.).

[64] Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, H. & B. 132, LEADING ILLUSTRATIVE CASES.

enough, to the widow's disadvantage. By these statutes, the widow is always compelled to elect between her dower and provisions made for her in the will, unless it expressly appears on the face of the will that the provisions for her were in addition to her dower.[65]

194. **The doctrine of satisfaction.**—The doctrine of satisfaction has to do with certain situations arising—not very frequently in this country—in the interpretation of wills. There are four classes of cases: 1. A owes B $1,000, payable January 1, 1913, and dies before that date, leaving a legacy to B of $1,000 or more, also payable January 1, 1913. A presumption arises that A does not wish his estate to pay both B's debt and his legacy; B, therefore, is required to elect between the two. This presumption, however, is not a very strong one, but may be defeated by slight circumstances.[66] 2. If A gives to B a legacy of $1,000, and in the same will or its codicil gives B $1,000 again, the second legacy is presumed to be in substitution for, or in satisfaction of, the first. But this result does not follow where the two legacies to B are given in different wills; or where the two legacies to B are of a different amount.[67]

195. **Same subject—Legacies and advancements or portions.**—The commonest form of satisfaction is the third. 3. A being B's parent, or *in loco parentis*

[65] Reed v. Dickerman, 12 Pick. 146 (Mass.), H. & B. 124; Warren v. Warren, 148 Ill. 641, 36 N. E. 611, 22 L. R. A. 393.

[66] Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81, H. & B. 140.

[67] De Witt v. Yates, 10 Johns. 156 (N. Y.), 6 Am. Dec. 326, H. & B. 144; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597, H. & B. 146.

(in a parent's place) to B, makes his will, leaving B a legacy of $1,000. Later, during A's lifetime, he makes a gift to B either equal to, or less or greater in amount than, the legacy. The presumption then arises that the gift was in satisfaction of the legacy, either wholly or *pro tanto* (so far as it goes). If, therefore, the gift was greater than the legacy, B takes nothing by the legacy. If it was less than the legacy—say $800—he takes the difference, or $200.[68] The rule, it will be noted, creates a presumption merely, which may be defeated by evidence of A's intention that B should take both the legacy and the gift. No such presumption arises when the legacy and gift are to a stranger. The theory of the rule is, that a parent naturally and usually wishes to benefit his children equally; if, therefore, after naming in his will the portion that a child is to receive, he makes a large gift to his child, on the occasion, say, of the child's marriage, the chances are that he did not wish to confer a double portion on that particular child, but intended the gift to be an advancement to the child on his portion. The testator, in short, becomes his own executor to the extent of the gift. With respect to gifts to strangers, however, testators have no such natural tendency to an equality of distribution. While there is no general presumption in the case of gifts to persons other than children, a gift to such person may be expressly made in satisfaction of a prior legacy.[69]

[68] Ex parte Pye, 18 Ves. 140 (Eng.); Pym v. Lockyer, 12 Sim. 394 (Eng.); Clark v. Jetton, 5 Sneed. 229 (Tenn.), H. & B. 155.

[69] Richards v. Humphreys, 15 Pick. 133 (Mass.).

4. A, by a settlement or similar instrument, secures to his child B a portion, and afterwards by will leaves B a legacy. Here again, there is a presumption that B is not to take both the portion and the legacy; he must choose between them.[70] This class is of little practical importance in this country, where formal family settlements are rare.

[70] Montagu v. Earl of Sandwich, 33 Beav. 324 (Eng.); Gilliam v. Chancellor & Murray, 43 Miss. 437, 5 Am. Rep. 498.

CHAPTER XIV.

NOTICE—BONA FIDE PURCHASE—PRIORITIES.

196. **Notice.**—We have frequently had occasion to state in relation to various equitable remedies and interests, that they were not enforceable against a bona fide purchaser without notice; and conversely, that they were enforceable against a purchaser with notice. It is necessary, therefore, to explain what is meant by the "notice" which has this important effect. In the first place, "notice" and "knowledge" are not by any means synonymous. A party who has knowledge of another's right also has notice of that right; but it by no means follows that a party without knowledge of A's right has no notice of that right. For example, the instrument creating a right in A may have been put on record, and B in consequence, who had never had the slightest intimation of the existence of such an instrument, may be as much bound by notice as if he knew every word of the instrument by heart. The question, What gives to B notice of A's right? means, What acts or circumstances are equivalent in their legal effect to an actual knowledge by B of A's right? In the example given the notice is constructive; that is to say, it is presumed as a conclusion of law.[71]

197. **Actual notice.**—In cases of actual notice, on the other hand, is it inferred as a conclusion of fact

[71] Pomeroy, Equity Jurisprudence, §§ 591-594.

that B obtained information of A's right. Suppose, for example, that B purchases land from C in which A has an interest. There is no direct evidence that A ever told B of this interest. It appears, however, that A was a member of B's family, and that B was acquainted with A's business affairs. From such facts, if strong enough, it may be inferred that B had information of A's claim; this inference, however, like any other inference from circumstantial evidence, may be rebutted by B.[72] Often the circumstances are such that they are said to put B upon inquiry. Thus, B purchases land worth $10,000 from C for $4,000. As a fact, A has an unrecorded claim upon the land—say, a mortgage or lien. Can the court or jury infer from this great inadequacy of the price at which C sold to B that B had notice of A's claim? The court or jury may properly reason thus: B, from the fact that C was willing to sell for so small a price, should have his suspicions aroused, and proceed to make all reasonable inquiries as to the existence of some claim upon the land by another party. B offers us no evidence that he made any investigation; it must be that he made no investigation because of his guilty knowledge that it would lead to a discovery of the truth. We are, therefore, justified in inferring that B had information of A's claim. If B shows us that he made some investigation, in a careless, perfunctory manner, the same inference is justified: he did this to keep up appearances. If, however, B shows as thorough an investigation as can reasonably be ex-

[72] Pomeroy, Equity Jurisprudence, § 596, and note.

pected as to the existence of adverse claims to the land, without the discovery of A's claim, his character as an honest man is established; he has rebutted the inference or presumption of notice raised by the suspicious circumstances.[73]

198. **Same subject.**—If B is informed by C, with whom he is dealing, or by A himself, that A has some claim on the property, he is, of course, bound to investigate and find out the nature of the claim.[74] If, however, his information comes from outside parties, whether or not he is put on inquiry depends upon circumstances. He need not stop to investigate every vague rumor or idle gossip. The test is, What would an honest man, of ordinary common sense, do, on the strength of the information received? His knowledge of a custom among business men may often necessitate an inquiry. Thus, B, negotiating for the purchase of C's liquor saloon, knows that C is indebted to A, a brewer, and also knows that it is the custom of brewers, in making loans to saloon keepers, to take a mortgage on their premises. Obviously, then, it is B's duty to inquire whether A holds a mortgage from C; if B purchases without making proper inquiries, he takes with notice of A's mortgage.[75] In prosecuting his inquiries, B should not rest satisfied with the information which C, the party with whom he is dealing, may

[73] Dunn v. Barnum, 51 Fed. 355, 10 U. S. App. 86, 2 C. C. A. 265; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Pomeroy, Equity Jurisprudence, § 597, and cases cited.

[74] Barnes v. McClinton, 3 Pen. & W. 67 (Pa.), 23 Am. Dec. 62; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657.

[75] Whitbread v. Jordan, 1 Younge & C. 303 (Eng.); Williamson v. Brown, 15 N. Y. 354, H. & B. 86.

give; for it is to C's interest to represent that the property which is the subject of negotiation is free from adverse claims.[76]

199. **Constructive notice—(1) By possession.**—Constructive notice, as has been stated, is a conclusion of law. One of the commonest species is that arising from possession of the land by a third person. B is negotiating for the purchase of land from C. The land in fact is occupied not by C, but by A, to whom C has previously made a valid contract to convey, so that A owns the vendee's equitable interest. B, as a prudent man, should ascertain who is occupying the land, and should ascertain from the occupant what rights he claims. In this case, as distinguished from cases of actual notice, it is not a mere inference of fact from circumstantial evidence that B is apprised of A's rights. It is a conclusion of law, arising from the fact of A's possession. In theory, it is a conclusion that may be rebutted by B; practically, however, the legal presumption is conclusive, since reasonably diligent inquiries would almost always result in finding out from A the truth as to A's claim.[77]

200. **Same subject—Of what the possession is notice.**—Suppose that A, the adverse claimant, is not in actual occupation of the land himself, but has put D into possession as his tenant for a year. Of what does B, the purchaser, have notice; merely of D's right to the land as tenant for the remainder of the

[76] Pomeroy, Equity Jurisprudence, § 601.

[77] Kirby v. Tallmadge, 160 U. S. 397, 16 Sup. Ct. 349; Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109.

year, or, in addition to this, of the rights of A, his landlord? There is authority both ways; but the majority of the cases hold the latter view. If B had made proper inquiries of D, he would, in all probability, have discovered that D was A's tenant, and so would have been led to inquire from A what his rights were. A tenant's possession, by this view, is notice of the landlord's title.[78] Again, A, a grantor, makes an absolute deed conveying the legal title to C, but reserves some right which entitled him to possession—for example, has an agreement which turns his deed into a mortgage. This agreement is not on record; but A retains possession of the land. Is this possession notice to B, the purchaser from C? Many cases hold that it is: that B is under the usual duty to make inquiries from A.[79] Other cases hold the contrary; pointing out that B, knowing from the record that his vendor, C, held by deed from A, would find nothing inconsistent—nothing to excite his suspicion—in the fact that A was still in possession, since it is a common thing enough for grantors to remain on sufferance for some time after they have conveyed title.[80] Again, the possession of A, in order to act as notice, must be exclusive, not shared with C. If C, for instance, has sold the premises to A, his wife, who shares C's occupation, and B buys from C on the faith of C's record title, the

[78] Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222, H. & B. 90, LEADING ILLUSTRATIVE CASES; Phelan v. Brady, 119 N. Y. 587. *Contra*, Hunt v. Luck, (1901) 1 Ch. 45 (Eng.), (1902) 1 Ch. 428.

[79] Illinois Central R. R. v. McCullough, 59 Ill. 166; Groff v. State Bank, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640.

[80] Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Bloomer v. Henderson, 8 Mich. 395, 404, 77 Am. Dec. 453.

wife's partial possession is no notice of her rights to B. It would, plainly, be pushing the rule of notice by possession to an inconvenient length to require a purchaser to make inquiries from every member of his vendor's family, on the possibility that one member might have an individual right.[81]

201. **Constructive notice—(2) Notice by lis pendens.**—Another very important species of constructive notice is that by lis pendens—by the pendency of an equity suit concerning the property. If during the progress of such a suit a party to the suit alienates the land to B, B takes the land subject to the rights of the prevailing party as determined by the final decree. The beginning of the suit is notice to B,—a notice that is absolutely binding and cannot be rebutted. Some such rule is a necessity to judicial proceedings: for if it were otherwise, a separate suit against B would be necessary; and B, during that suit might transfer the land to D, and so on indefinitely, making litigation interminable.[82] The notice given by pendency of a suit begins from the time when the court acquires jurisdiction of the defendant by service of the subpoena or summons after the filing of the bill,[83] and lasts until judgment, or until the expiration of a reasonable time to appeal after the judgment.[84] The effect of the notice, however, may be lost by a lack of diligence in prosecuting the

[81] Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661.

[82] Pomeroy, Equity Jurisprudence, §§ 632, 633; Bellamy v. Sabine, 1 De G. & J. 566, 578, 584 (Eng.); Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28.

[83] Norris v. Ile, 152 Ill. 190, 199, 38 N. E. 762, 43 Am. St. Rep. 233.

[84] Olson v. Liebpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327.

suit.[85] The notice exists in all suits in equity concerning specific land; to what extent it exists in suits concerning personal property is not entirely settled. It is universally agreed, however, that the notice does not extend to a suit relating to negotiable instruments. Even if A, the plaintiff in such a suit, obtains an injunction against B, the holder of the negotiable instrument, B may still transfer a good title, in violation of the injunction, to C, a bona fide purchaser for value before maturity of the paper.[86]

202. **Same subject—(3) Notice by reference in the chain of title.**—A person is bound by notice of matters recited or referred to in his chain of title,—that is, in the succession of deeds or other instruments by which he traces his title back to its original source. Thus, A holds by deed from B, who held by a deed from C. The latter deed recited that it was made subject to a lease or mortgage to X. A is bound with notice of X's lease or mortgage, even though he never heard of it, and never read the deed from C to B in which it is referred to.[87] Moreover, he is bound by notice of all that is contained in X's lease or mortgage. An express reference to the instrument is not necessary to constitute a notice; a recital in A's chain of title may lead A to infer that such an instrument is in existence. Thus, a statement in the deed from C to B that the lot conveyed

[85] Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 379.

[86] County of Warren v. Marcy, 97 U. S. 96, 1 Scott, Cases on Equity, p. 529.

[87] National Bank v. Morris, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463; Pringle v. Dunn, 37 Wis. 449, 464, 19 Am. Rep. 772, H. & B. 92.

is bounded by the land of Y leads to the inference that Y holds the adjoining lot by an earlier title—a fact that may be of importance to A, as in the case where both lots are covered by the same mortgage.[88] The statement or recital may give rise to the inference of some fact other than the existence of a document or instrument. Thus, if the deed from C to B recites that a part of the purchase money is unpaid, A, purchasing from B, will be bound by notice of C's lien for the purchase price, in those states where the grantor's lien exists.[89]

203. **Same subject—(4) Notice by recording.**—It is the universal policy in this country to secure publicity and certainty in titles to land by means of the registration or record in a public office of all instruments affecting the titles. The statutes declare, in effect, that a conveyance, mortgage, etc., from A to B is void as against a subsequent conveyance, mortgage, etc., from A to C which is first put on record. The necessary result is, that if B's instrument is recorded first, the record is constructive notice, absolutely binding on all persons subsequently dealing with A respecting the land. Such persons cannot be heard to say that they made inquiries, examined the record, etc., and obtained no knowledge of B's instrument. In order to have this effect upon C, the subsequent purchaser, B's instrument must be one which the statutes authorize to be recorded. The statutes, for example, almost always require the instrument to be duly executed and properly acknowl-

[88] George v. Wood, 9 Allen 80 (Mass.), 85 Am. Dec. 741.
[89] Deason v. Taylor, 53 Miss. 697, 701, H. & B. 97.

edged, in order to be entitled to record. If these formalities are not complied with by B, placing the instrument on record is a nullity, so far as imparting constructive notice to C, the subsequent purchaser, is concerned.[90]

Suppose, again, that the registration officer is negligent in the performance of his duty, and makes a mistake in transcribing the instrument; for example, B's mortgage is expressed to be for the sum of $10,000, but through careless copying the record of it is made to read $1,000 only. Is C, a subsequent purchaser of the land, affected with notice of the mortgage to its full amount, $10,000, or only to the extent of $1,000? The latter would seem the fair and reasonable answer, since it is no great burden on B to require of him that he see to it that his instrument is properly recorded.[91] About half the states, however, hold that C has notice of the terms of the original instrument: being led to this conclusion by the language of the recording acts, many of which state that the recording is deemed to be complete, so far as B is concerned, from the moment when his instrument is left with the proper officer for record.[92] It logically follows that B is secure after depositing his instrument for record, though it was never transcribed upon the recorder's books at all. All cases agree that the effect of a record, once made, is

[90] Pringle v. Dunn, 37 Wis. 449, 460, 461, 19 Am. Rep. 772, H. & B. 92; Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523.

[91] Frost v. Beekman, 1 Johns. Ch. 288 (N. Y.), 1 Scott, Cases on Equity, p. 531, LEADING ILLUSTRATIVE CASES; Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 354.

[92] Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84.

not destroyed by the subsequent destruction by fire or otherwise, of the recorder's books.[93]

204. **To whom the record is notice.**—A makes a mortgage to B, and B assigns the mortgage to C, who puts his assignment on record. Is this record notice to A, so that A's subsequent payments to B, in ignorance of the assignment, are ineffectual to reduce the mortgage debt? So to hold would, manifestly, be a hardship to A, who would then be obliged to search the record every time he made a payment of principal or interest. Notice by record does not act retrospectively, so as to affect rights which have already been acquired. At first sight this seems inconsistent, perhaps, with the rule that C's prior record of his later instrument defeats D's earlier unrecorded instrument. In case, for instance, the mortgagee had made two assignments, first to D, unrecorded, and afterwards to C, recorded, C's would prevail. This result follows, however, from the express language of the statute, which declared that C's earlier record avoids D's title: not that C's earlier record is notice to D.[94]

Again, suppose that A conveys a lot to B, who neglects to record his deed; B then conveys to C, whose deed is put on record. Later, A conveys the same lot to X. Has X constructive notice of C's deed? So to hold would, in practice, put upon X the necessity of examining every instrument in the recorder's office, on the chance that it might relate to

[93] Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464.

[94] Murphy v. Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438.

the lot which he is about to purchase; for the records are indexed, not by description of the land, but by the names of grantors and grantees. C's deed, therefore, so far as X or other purchasers deriving title from A are concerned, is not within the protection of the recording acts.[95] When there is a break like this in a recorded chain of title, subsequent deeds in the chain impart no notice to parties deriving title from a record owner further up in the chain of title.

205. **Other notice in place of a record.**—Suppose A conveys to B, and B's deed is unrecorded; A subsequently conveys to C, who records his deed; but C at the time of his purchase has notice of some kind, of B's deed: say, notice from facts putting him on inquiry, or notice from B's possession of the land. Now the statutes of many states declare, without making any exception, that C's prior record renders void B's prior deed. Notwithstanding, it is almost universally agreed that if C purchased with notice of any sort, actual or constructive, of B's title, his prior record is no protection to him, and he takes subject to B's rights under the unrecorded instrument, whatever those rights may be. This rule is adopted and enforced in this country, by courts of law and of equity alike. It is wholly independent of any question of fraud or bad faith on the part of C, the subsequent purchaser. The purpose of the recording acts is to give notice of prior titles; if that notice has already been imparted in some way which

[95] Losey v. Simpson, 11 N. J. Eq. 246; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932.

the law recognizes, the purpose of the statutes has been accomplished. Virtually then, nearly all such acts are interpreted as if they read (as indeed many of them do read), An unrecorded instrument is void as against a subsequent bona fide purchaser without notice, whose instrument is first recorded.[96]

206. **Constructive notice—(5) Notice to agent is notice to principal.**—Notice to an agent, received in the course of his employment, is notice to his principal.[97] The policy and necessity of this rule is obvious; without it, a person could protect himself from the liabilities depending on many forms of notice by the simple method of employing an agent. The rule, however, is subject to various limitations to prevent its working an injustice to the principal. Thus, the notice must, as a general rule, have been received by the agent in the same transaction.[98] For example, if A is employed by B to loan money for him and take a mortgage on certain land, notice received by A in the course of the transaction that there was an unrecorded mortgage on the land would be binding on B, while similar notice imparted to A ten years before would not affect B. If, however, the notice was given to A so recently that he must have had it in mind while transacting B's business, B is affected by such actual knowledge on A's part.[99] Again, the rule will not be allowed to protect an

[96] Pomeroy, Equity Jurisprudence, §§ 659-665.

[97] The Distilled Spirits, 11 Wall. 356 (U. S.); Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

[98] Lowther v. Carlton, 2 Atk. 242 (Eng.), 1 Scott, Cases on Equity, p. 501; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92.

[99] The Distilled Spirits, 11 Wall. 356 (U. S.); Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734.

agent in a fraud upon his principal. If the agent receives notice of a fact while committing a fraud on his principal for his own benefit, and the success of the fraud requires that he keep the fact to himself, there can be no presumption that he imparted his knowledge of the fact to the principal; his knowledge or notice, therefore, does not affect the principal.[1]

207. **Bona fide purchaser—The valuable consideration.**—The absence of notice is only one of the elements that go to make up a bona fide purchase. Good faith—bona fides—is another. If the party setting up the defense of bona fide purchase himself obtained his title from his immediate grantor through fraud of any sort, he is not entitled to protection.[2] The third element is the valuable consideration. A volunteer—a donee, devisee, or heir,—is not a bona fide purchaser. There must be a parting with something of value, or a change of legal position for the worse.[3] The chief difficulty comes in determining whether an antecedent debt is a valuable consideration. A owes B $1,000; in consideration of B's promise to consider the debt satisfied, or to forbear suing on it for a certain time, A conveys Blackacre to B: B in either case, having given up a legal advantage, is a purchaser for value.[4] On the other hand, suppose that A conveys Blackacre

[1] American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E 282, 52 Am. Rep. 710.

[2] Pomeroy, Equity Jurisprudence, § 762.

[3] Ten Eyck v. Whitbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; The Elmbank, 72 Fed. 610.

[4] State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; Randolph v. Webb, 116 Ala. 135, 22 South. 550; *contra*, Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.

to B merely as security for the payment of the $1,000 already owing: B has parted with nothing, but on the contrary is better off than he was before; hence B is not a purchaser for value.[5] To both of these two rules, however, there is much dissent. There is a general agreement that the amount of the consideration is immaterial to the question of purchase for value; though, as we have already seen, a grossly small consideration may excite suspicion, and put upon inquiry, and in this way give rise to actual notice.[6]

208. **Same subject—The payment.**—The payment must be actual, not a mere contract to pay. If A receives a conveyance from B on a promise to pay therefor $1,000, and then loses the land to C on the latter's prior claim, A can resist B's suit for the $1,000 because of failure of the consideration; or if he has given a bond for the $1,000, so that he cannot set up failure of consideration in a suit thereon by B, he may have the bond cancelled in equity.[7] A, therefore, by his mere contract to pay has made no irrevocable change of position, and hence is not a purchaser for value. On the other hand, if A has given to B his negotiable note for the price, he has put it in B's power to cut off his defense of failure of consideration by negotiating the note before maturity; a payment by A in this form,

[5] Young v. Guy, 87 N. Y. 457, 1 Ames, Equity Jurisdiction Cases, p. 207; Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; *contra*, Chaffee v. Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753.

[6] See § 197; Dunn v. Barnum, 51 Fed. 355; Ten Eyck v. Whitbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809.

[7] Jewett v. Palmer, 7 Johns. Ch. 65 (N. Y.), 11 Am. Dec. 401.

therefore, is equivalent to a payment in cash.[8] Again, suppose that A has paid part, but not all, of the price, before receiving notice of C's adverse claim. Some courts hold that he is in no better position than if he paid nothing at all.[9] This seems unduly harsh to A. C should at least be compelled to refund to A as a condition of enforcing the prior claim such payment as A has made; or, perhaps, A should be treated as a bona fide purchaser of a partial interest in the land.[10]

209. **Purchaser with notice from a bona fide purchaser.**—Suppose that A conveys to B, a bona fide purchaser without notice of X's prior right, and B in turn conveys to C who takes with notice of that right. At first sight, we should take it for granted that X's right was enforceable against C. The rule, however, is the other way. B in order to reap the full advantage of his position as a bona fide purchaser must be able not only to enjoy the possession of the property, but to alienate it freely. When land once comes into the hands of a bona fide purchaser it is forever freed from the equities which might before have been asserted against it.[11] To this rule there is one exception. If a former owner of the land, before it reached B's hands—A, for instance,—had

[8] Partridge, Wells & Co. v. Chapman, 81 Ill. 137; Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

[9] Tourville v. Naish, 3 P. Wms. 307 (Eng.); Dugan v. Vattier, 3 Blackf. 245 (Ind.), 25 Am. Dec. 105.

[10] Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380.

[11] Harrison v. Forth, Prec. Ch. 51 (Eng.), 1 Scott, Cases on Equity, p. 500; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; English v. Lindley, 194 Ill. 181, 62 N. E. 522.

notice of X's equity, B's reconveyance to such former owner will revive the equity. This exception is not an arbitrary one. It is designed to prevent a holder in bad faith from perfecting his title by the easy device of conveying to a purchaser whose bad faith might be difficult to prove, and then re-purchasing at his convenience.[12]

210. **Is a quitclaim grantee a bona fide purchaser?** —A conveys title to B by quitclaim deed—one without the usual covenants of warranty. Many cases—perhaps a majority—hold that by accepting a deed in this form B forfeits all right to be considered a bona fide purchaser; that he is apprised thereby that A has not a perfect title, and hence takes subject to X's prior unrecorded claim.[13] Other cases deny all this, and assert that there is nothing about a quitclaim deed that imparts notice, and that a quitclaim grantee, therefore, may be as much a bona fide purchaser as a grantee by warranty deed.[14] A third group of cases holds that a quitclaim grantee may be a bona fide purchaser, but that the absence of warranty should arouse his suspicion, and put him upon reasonable inquiry as to the existence of other claims against the land. This seems to be a reasonable view, but is the law of only a few jurisdictions.[15]

[12] Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638.

[13] American Mortgage Co. v. Hutchison, 19 Ore. 334, 24 Pac. 515.

[14] Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426; Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370.

[15] United States v. California & O. Land Co., 49 Fed. 496, 505, 7 U. S. App. 128, 1 C. C. A. 330; Schott v. Dosh, 49 Nebr. 187, 68 N. W. 346, 59 Am. St. Rep. 531. See, also, 2 Pomeroy, Equity Jurisprudence, (3d ed.), § 753, note.

211. **How the question of bona fide purchase may arise.**—The defense of bona fide purchase was originally and still is for the most part an equitable defense, arising where the holder of a prior equitable interest or "equity" sought to enforce it against the holder of the legal estate.[16] Contests between holders of rival "equities" or equitable interests are governed by a different set of rules.[17] Apart from the recording acts, there was very little occasion for its application in a suit by the holder of a legal estate.[18] If A conveys Blackacre to B, and afterwards A conveys the same land to C, the dispute between B and C concerns legal titles only, and presents no question for equity.[19] To B's action for ejectment against C, it was no defense (before the recording acts) that C purchased in good faith with no notice of B's title: since all A's estate passed by the first conveyance, there was nothing left to pass to C. The recording acts, as interpreted by the courts, have changed this, as we have seen. The dispute between B and C concerning their legal titles is still a legal question, to be tried in ejectment. Whether C, however, can set up his prior record in defense to B's ejectment, depends upon whether he purchases without notice and for value—a question of equity. The effect of the recording acts, then, has been to carry over into the common law the equity doctrine as to bona fide purchase, and to apply it in contests between legal

[16] Pomeroy, Equity Jurisprudence, §§ 735-744, 766-778.

[17] See §§ 212-215.

[18] For the exceptional cases, see Pomeroy, Equity Jurisprudence, §§ 764, 765.

[19] Pomeroy, Equity Jurisprudence, § 679, and notes.

titles.[20] While the doctrine has thus become a legal one, applied by courts of common law, its application by courts of equity remains unaltered. The defense may be set up if the facts warrant it, in all suits to enforce or establish an equitable interest in land,—suits for specific performance, to foreclose a mortgage, or other lien, to enforce a constructive or resulting trust, and the like.[21] The defense may likewise be set up in suits to enforce an equity—that is, a right to an equitable remedy—affecting the land, such as reformation or rescission for mistake, or cancellation for fraud.[22]

212. **Priorities.**—We have now to consider the question, where there are two or more rival equitable interests in the same property, which shall prevail? If A and B both have an equitable lien on the same land, and its proceeds are not sufficient to pay both, which shall be paid first? If C assigns a thing in action or a fund to A and afterwards to B, does A or B have the first claim? The rules for settling such questions are summed up in two maxims: Where there are equal equities, the first in order of time shall prevail; and Where these are equal equities, the law shall prevail. Applying these maxims to the solution of a problem of priorities, we first ask, Are the equities intrinsically equal? Are they of the same rank, are A and B equally without fault, and entitled to equal consideration from the court? If they are thus equal, we next ask, has either A or

[20] Pomeroy, Equity Jurisprudence, §§ 758, 759.
[21] Pomeroy, Equity Jurisprudence, §§ 766-773.
[22] Pomeroy, Equity Jurisprudence, §§ 775-778.

B obtained the legal estate in the property in addition to his equitable claim? If this question is answered in the negative, we fall back, as a last resort, upon the order of time in which the equities arose, and award priority to the one first created.[23]

213. **What equities are intrinsically superior—Purchase money mortgages—Judgment liens.**—For lack of any general definition, we may give an illustration of an equity which is intrinsically superior. A contracts to convey land to B: before conveyance is made, C, a claimant against B obtains a lien on the land:—say, a mechanics' lien. A then conveys to B and as part of the same transaction takes back a purchase money mortgage to secure the price. Such a mortgage is deemed to be superior to all other liens or claims against the land.[24] We here have recognized the same sort of natural equity, in favor of one who has parted with land without receiving the price, that has given rise to the grantor's lien.[25] By far the most important form of intrinsic superiority in this country is that created by record. If A gives a mortgage to B, which is unrecorded, and afterwards a mortgage to C, who takes it without notice and puts it on record, C, by force of the recording acts, becomes a first mortgagee, and so entitled to priority in distribution of the proceeds of the mortgaged property. In many states the same superiority is given to the lien of a judgment creditor: a docketed judgment, in those states is superior

[23] Pomeroy, Equity Jurisprudence, §§ 413-417, 678.

[24] Strong v. Van Deursen, 23 N. J. Eq. 369; Clark v. Munroe, 14 Mass. 351; Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644.

[25] See § 164.

to the lien of a prior unrecorded mortgage, or of any other prior lien of which the judgment creditor had no notice;[26] and in accordance with the principle of § 209, a purchaser even with notice at the execution sale under such judgment obtains a good title.[27] In other states a judgment lien is given no such superiority. Such lien is a legal interest, to be sure, but not an estate; and the creditor is not a purchaser, within the recording acts. In these states the judgment is a lien only on such interest as the debtor actually has in the land, and hence is subject to earlier unrecorded mortgages and liens and to such equities as those of reformation or cancellation existing in favor of third parties.[28] Whether the purchaser at execution sale under such judgment takes free from equities and unrecorded liens depends upon whether or not his purchase comes up to the ordinary requirements of a bona fide purchase without notice.[29]

214. **Equity inferior because of conduct of holder thereof—Effect of notice.**—An equity otherwise superior, because fortified by the legal estate, or because first in order of time, may become inferior because of the fraud or gross negligence of the holder thereof. Thus, B, being about to take a lien on cer-

[26] Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190.

[27] Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32.

[28] Brown v. Pierce, 7 Wall. 205 (U. S.), H. & B. 326, 1 Scott, Cases on Equity, p. 708; Hampson v. Edelen, 2 Har. & J. 64 (Md.), 3 Am. Dec. 530, 2 Scott, Cases on Equity, p. 708.

[29] Draper v. Bryson, 26 Mo. 108, 69 Am. Dec. 483; Pugh v. Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392; Moyer v. Hinman, 13 N. Y. 180, 2 Keener, Equity Jurisdiction Cases, p. 344.

tain property, inquires of A, a prior lienholder, whether A already has a lien thereon: A denies that he has a lien, or refuses to disclose it, so that B is induced to loan his money on the property; A is then estopped to assert the priority of his lien. This rule, that an equity may be postponed because of fraud or negligence is of great practical importance in England, but is comparatively seldom invoked in this country, under the recording acts.[30] More important is the rule that a subsequent equity, otherwise superior, either intrinsically, or because recorded, or because it accompanies the legal estate, is postponed when it is acquired with notice of the earlier equity.[31] The converse of this principle, however, is by no means true. The fact that a later equitable interest is acquired *without* notice of a prior one gives it no superiority. If acquired *with* notice, it is inferior; its acquisition without notice merely raises it to a position of equality, and thus gives scope to the maxim, Between equal equities the first in order of time prevails.[32] If A contracts to sell land to B and afterwards contracts to sell the

[30] Storrs v. Barker, 6 Johns. Ch. 166, 168 (N. Y.), 10 Am. Dec. 316; Heyder v. Excelsior B. L. Ass'n., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, H. & B. 70; Northern Counties Ins. Co. v. Whipp, L. R. 26 Ch. Div. 482 (Eng.), 1 Scott, Cases on Equity, p. 353.

[31] Saunders v. Dehew, 2 Vern. 271 (Eng.), Ames, Cases on Trusts, p. 289; Mackreth v. Symmons, 15 Ves. 329, 350 (Eng.), 1 Scott, Cases on Equity, p. 71; Jackson's Case, Lane 60 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 143, 2 Scott, Cases on Equity, p. 471.

[32] Phillips v. Phillips, 4 De G. F. & J. 208, 215, 216 (Eng.), H. & B. 72, Ames, Cases on Trusts, p. 331, 1 Scott, Cases on Equity, p. 333, 511, LEADING ILLUSTRATIVE CASES. For questions arising from the state of facts, common in England but comparatively rare in this country, where the holder of a later equity, acquired without notice of the earlier, protects himself by getting in the legal estate, see the subject, Trusts.

same land to C, who has no notice of B's contract, C's claim is no better than B's. It is only in the case when C pays the price and acquires the legal title that the doctrine of bona fide purchaser comes into play.

215. **Priorities on assignment of things in action, or of a trust fund.**—A is a debtor or trustee, B his creditor or cestui que trust. B assigns his claim—the debt, or the interest in the trust fund—first to C, and afterwards to D. Which shall prevail? The simplest answer is, C, since he is first in order of time. This is the view of, perhaps, the majority of the states.[33] But there are serious practical difficulties in the way of the application of the usual rules of priority to this situation. Estates and interests in land may be effectually protected by recording, in this country, or by possession of the title deeds, in England. Title to chattels may usually be protected by possession. But there is no such thing as recording of money claims; and possession of the money is not in the assignor's power to deliver. The rule is established in England, therefore, that the first assignee who takes the natural and obvious step toward obtaining possession, by giving notice of the assignment to the debtor or trustee, A, obtains priority in payment. Such notice amounts to a sort of informal registration of the assignment; not so effective, to be sure, as a public record, for A is under no duty to give information to a would-be assignee regarding prior assignments. This rule is

[33] Muir v. Schenck & Robinson, 3 Hill 228 (N. Y.), 38 Am. Dec. 633; Thayer v. Daniels, 113 Mass. 129.

followed to a considerable extent in the United States.[84]

[84] Dearle v. Hall, 3 Russ. 1, 48 (Eng.), Ames, Cases on Trusts, p. 323; In re Phillips' Estate, 205 Pa. St. 504, 55 Atl. 213, 97 Am. St. Rep. 743; Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632.

CHAPTER XV.

MAXIMS OF EQUITY AND GENERAL PRINCIPLES OF JURISDICTION.

216. **The maxims.**—Several of the broadest and most general principles are expressed in short sentences known as Maxims. These maxims are all most distinctive and characteristic of the equity system: they vary greatly, however, in their importance, some being applicable to every remedy,—e. g., the maxim "He who seeks equity must do equity"; others being the source of a limited number of rules. A maxim is necessarily too vague a statement to be of much service in the solution of concrete problems, without a great deal of elucidation; but for the student, there is no better way to catch the spirit of our subject than to obtain a sound grasp of these very general principles. It has been said that "he who has grasped them all with a clear comprehension of their full meaning and effects has already obtained an insight into whatever is essential and distinctive in the system of equity jurisprudence, and has found the explanation of its peculiar doctrines and rules."[35] About fifteen maxims have been enumerated; we shall confine ourselves to eleven which we have had illustrated in the preceding discussions. These are, Equity will not suffer a wrong without a

[35] Pomeroy, Equity Jurisprudence, § 363.

remedy; Equity follows the law; He who seeks equity must do equity; He who comes into equity must come with clean hands; Equity aids the vigilant, not those who slumber on their rights; Equity acts in personam and not in rem; Equity looks to the intent or substance rather than to the form; Equity regards that as done which ought to be done; Equality is equity; Where there are equal equities, the first in order of time shall prevail; Where there is equal equity, the law must prevail. The last two embody the rules concerning priorities, and have already been explained as fully as our limits allow.

217. **Equity will not suffer a wrong without a remedy.**—This maxim sums up the early history of equity—the motives which brought the court of chancery and the equity system into being. The purpose of the court was the redressing of wrongs for which the common law afforded no remedy whatever, or no remedy adequate to do full justice. Equity, however, never went to the extent of correcting all the harsh and unjust rules of the common law; nor does it today attempt the redress of merely moral wrongs, or the enforcement of merely moral duties. If a man of wealth allows his sister to languish in poverty, he may be guilty of a great moral wrong and justly incur the scorn of society, but equity affords no redress. The maxim, however, is by no means meaningless. It is as true today as it ever was, that the principles and remedies of equity will be extended to cover entirely novel states of fact. However unusual the situation, equity will mould and adjust its remedies to meet the emergency:—

subject, always, to the restraining rule, that the legal remedy is inadequate.[36]

218. **Equity follows the law.**—This maxim, at first sight, seems to be squarely contradictory of the last. If equity always followed the law, there would be no system of distinct equitable remedies and principles. It is true, however, that outside of the domain of equitable estates and interests, equity in the main adopts the legal rules of the substantive law of contracts and torts. In the specific performance of contracts, for example, the court looks to the rules of the common law to determine whether a valid contract exists; it then applies its own standards to decide whether its peculiar remedy shall be applied. In enjoining a trespass or a nuisance, again, it looks to the law to ascertain whether the threatened act really constitutes a tort or not. Equity never undertook to build up a distinct law of contracts or of torts,[37] in rivalry with the common law. The maxim finds a clear illustration in the application to equitable interests of the legal rules of descent and succession;[38] yet even here we find a striking exception: in that equitable estates in fee, though subject to curtesy, are not subject to dower.[39] The maxim, in fact, amounts to this: that many of the rules which a court of equity is called upon to enforce, in the administration of its reliefs, are rules of the common law, not rules of

[36] See the Introductory Chapter.

[37] There are some exceptions, such as Equitable Waste: see § 42.

[38] Cowper v. Cowper, 2 P. Wms. 720, 752 (Eng.), 1 Scott, Cases on Equity, p. 296, Pomeroy, Equity Jurisprudence, § 426.

[39] See § 125.

equity proper. If there is a clash between a rule of equity and a rule of law, the former, of course, prevails.

219. **He who seeks equity must do equity.**—Every suit in equity is, or may be subject to the operation of this maxim. Whenever a suitor asks the aid of a court of equity, he must be prepared, as a condition to obtaining relief, to admit and secure to the other party all the latter's equitable claims involved in the subject matter of the controversy. Thus, a vendee, suing for specific performance, must pay or secure the payment of the purchase price, according to the terms of the contract; the vendor, in his suit, must convey such title as the contract calls for: if his title is doubtful, involving the vendee in a possible law suit to defend it, equity will withhold relief.[40] A person suing to rescind or cancel a deed or contract because of fraud or mistake must return the consideration received, and restore the other party to the situation in which he was before the transaction.[41] A tax payer seeking to restrain the collection of an illegal tax must pay such portion of the tax as is lawfully due.[42] A striking illustration was the doctrine as to the wife's equity to a settlement, whereby a husband, asking the aid of a court of equity to reduce his wife's property into his possession, was obliged to make a suitable pro-

[40] See § 24.

[41] Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663, 2 Scott, Cases on Equity, p. 247, 3 Keener, Equity Jurisdiction Cases, p. 699; Neblett v. Macfarland, 92 U. S. 101, 3 Keener, Equity Jurisdiction Cases, p. 693.

[42] People's National Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68.

vision for the wife, by way of a separate estate.[43] Another instance is the doctrine of marshalling of securities; a person foreclosing a mortgage or lien must avoid an unnecessary injury to third persons having rights in the property inferior to his own.[44] A plaintiff seeking the aid of equity to establish his title to or claim upon land, on which another in good faith, under a mistake as to the title, has made improvements, will be awarded relief only on condition that he make just compensation for the improvements.[45] These are merely illustrations among an unlimited number of applications of the maxim.

220. **Same subject.**—The relief to which the defendant is entitled, by virtue of the maxim, must be connected with the subject matter of the suit; he cannot take advantage of the maxim to assert any and every claim which he may have against the plaintiff, growing out of entirely unrelated transactions.[46] On the other hand, it is quite possible by the operation of the maxim, for the defendant to obtain a relief that he would not be able to enforce by an independent suit in equity or action at law. This is illustrated by two of the instances in the last paragraph. The wife was awarded a settlement in a suit by the husband, in many cases, where she herself as plaintiff would have no standing in a

[43] See § 142.

[44] See § 159.

[45] Williams v. Vanderbilt, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489; Thomas v. Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519.

[46] Comstock v. Johnson, 46 N. Y. 615, H. & B. 26; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

court of equity.[47] A person making improvements in good faith upon the land of another has as a general thing, no right to bring a suit of his own to recover compensation from the owner, but must await the institution of a suit in equity by the latter.[48] The maxim, however, is not pushed so far as to enable a court of equity to impose arbitrary conditions upon its suitors.

221. **He who comes into equity must come with clean hands.**—This maxim, like the last one, is applicable to all equitable remedies, though the occasions for invoking it are hardly so frequent. In its effect it is much more stringent than the last. It does not permit the giving of relief upon terms or conditions, but denies to the plaintiff all relief whatever. It shuts the doors of equity in the face of the suitor whose conduct in the transaction does not measure up to equitable standards. Its application to suits arising from illegal transactions we have already considered.[49] Similar rules apply to the guilty parties to a fraudulent transaction: such a party cannot sue in equity either to enforce the transaction or to set it aside, or to obtain his share of the proceeds from his associate in the fraud.[50] In particular, a person who has conveyed or transferred his property in fraud of his creditors cannot come into

[47] See § 142.

[48] Pomeroy, Equity Jurisprudence, § 1241, note; Moore v. Cable, 1 Johns. Ch. 385 (N. Y.). By statutes in many states, the defendant in ejectment may also recover compensation for improvements.

[49] See § 182; Dering v. Earl, 1 Cox Ch. 318 (Eng.), LEADING ILLUSTRATIVE CASES.

[50] Bartle v. Nutt, 4 Pet. 184 (U. S.); In re Bleakley's Appeal, 66 Pa. St. 187, H. & B. 31; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

equity for the purpose of having the transfer set aside.[51] A person or corporation whose trade mark, label, or advertisement is an imposition upon the public, cannot, as we have seen, enjoin the unfair competition of a rival.[52] The defense of hardship or unfairness in specific performance is a good illustration of the working of the maxim.[53]

222. **Same subject.**—The inequitable conduct which debars the plaintiff from relief must be in some way connected with the transaction which is the subject of the suit; just as under the last maxim the "equity" of the defendant which the plaintiff is obliged to recognize must be connected with the transaction. The court does not scrutinize the whole past career of the plaintiff, or his conduct in unrelated matters. A druggist sued to enjoin the operations of an illegal drug trust. The defendants attempted to invoke the maxim by showing that he had sometimes imposed upon his customers by substituting the wrong ingredients in prescriptions. This conduct was held to be too remote from the subject of the suit.[54]

223. **Equity aids the vigilant, not those who slumber on their rights—Laches.**—This maxim expresses, in somewhat rhetorical form, the defense of laches, or delay, which is invoked in a large proportion of equitable suits. In most states the Statute of Limi-

[51] Massi v. Lavine, 139 Mich. 140, 102 N. W. 665, 1 Scott, Cases on Equity, p. 286; Pride v. Andrews, 51 Ohio St. 405, 38 N. E. 84.

[52] See § 57.

[53] See § 22.

[54] Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

tations does not, by its terms, apply to suits in equity. The question whether the plaintiff's delay shall debar him from relief, therefore, is confided to the court's discretion, depending on the circumstances of the individual case. The holdings as to laches vary much with the nature of the suit. Thus, in a suit by a cestui que trust against an express trustee, laches cannot be set up, unless the breach of trust has been brought home to the knowledge of the cestui,[55] for it is of the essence of the trust relationship that the beneficiary is excused from the duty of vigilance. A party in possession of land may delay as long as he likes before seeking to establish his title, without being chargeable with laches: it is his privilege to wait until his title is attacked, if he sees fit.[56] The defense of laches does not apply in suits for an injunction to protect a strict legal right, such as suits against nuisances or the infringement of patents.[57] On the other hand, in the remedy of specific performance, which is largely discretionary, the defense of laches appears to be applied by the courts with more than usual stringency.[58]

224. **Same subject.**—Many able courts—probably a majority—in recent years have announced a tangi-

[55] New Orleans v. Warner, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. Ed. 96; Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077.

[56] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

[57] Galway v. Metropolitan Elevated R. Co., 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, Equity Jurisdiction Cases, p. 601, 1 Keener, Equity Jurisdiction Cases, p. 822; Ide v. Trorlicht, etc., Co., 115 Fed. 137, 148, 1 Ames, Equity Jurisdiction Cases, p. 642.

[58] See § 25.

ble principle on which to decide whether the plaintiff's delay has been excessive. In the view of these courts, the delay is not fatal unless it works a disadvantage to the other party. "So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of right."[59] Thus, the delay will constitute laches where it has resulted in the loss of evidence on behalf of the defendant, through the death of his witnesses,[60] or where "the memories of those who had knowledge of the material facts have become faded and weakened by time";[61] or where the defendant, on account of the delay, has made extensive improvements on the property.[62] Laches, in this view, becomes a species of unfair conduct, prejudicial to the defendant; and the doctrine thereon a special application of the two maxims, "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." It cannot be said, however, that all the courts, especially the federal courts, have accepted this view.[63]

[59] Chase v. Chase, 20 R. I. 202, 37 Atl. 804; Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221 (Eng.); 1 Pomeroy, Equitable Remedies, § 21.

[60] Baker v. Cunningham, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490.

[61] Lutjen v. Lutjen, 64 N. J. Eq. 773, 53 Atl. 625.

[62] Gibson v. Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

[63] Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; see 1 Pomeroy, Equitable Remedies, § 23.

225. **Equity acts in personam and not in rem.**—The usual meaning of this important maxim was explained in the introductory chapter, together with the changes made by modern statutes.[64] One important result of the action of equitable remedies on the person should be noticed, by way of review, as it is, perhaps, the most characteristic thing in the whole system. Equity does not permit an unconscientious use to be made of a legal title: that is, a use that is a violation of equitable principles. Equity fully recognizes that A is vested by common law or by statute with a legal estate, but compels him to hold it or use it for the benefit of B, to whom A owes an equitable duty. We have seen this process illustrated in equitable waste;[65] in the way in which equity treats the Statute of Frauds, as when A is vendor under a land contract which has been part performed by B,[66] or holds land by a conveyance from B which was intended as a mortgage,[67] or on a resulting or constructive trust for B;[68] in the way in which equity treats the Statute of Wills, where A has obtained by fraud a devise which equitably belongs to B;[69] or in the doctrine (now accepted by American courts of law) that the recording acts, in spite of their express language, do not protect a purchaser with notice of a prior unrecorded deed or mortgage.[70]

[64] See §§ 9, 10.
[65] See § 42.
[66] See §§ 27-31.
[67] See § 152.
[68] See §§ 129-133.
[69] See § 133.
[70] See § 205.

226. **Equity looks at the intent or substance, not at the form.**—We have had several important illustrations of this maxim. The seal has not the importance in equity that it has, or had, at common law. Thus, equity does not specifically enforce an agreement without a consideration, though the agreement is under seal and hence binding at common law.[71] An instrument intended to be a mortgage, but defective as a legal conveyance from lack of a seal or for other reason, may be treated as creating an equitable lien;[72] similarly, a defective deed may be treated in equity as a contract to convey.[73] The doctrine as to penalties and forfeitures;[74] as to the equity of redemption;[75] and especially as to the absolute deed treated as mortgage,[76] are further examples. Equity, as a whole, is characterized by an absence of the formalism which marked the common law until very recent times, and still marks it, to a large degree. Excessive attention to forms and ceremonies is a trait of primitive systems of law; it is the absence of this in equity which gives it much of its modern and scientific character.

227. **Equity looks on that as done which ought to be done.**—This maxim has been mentioned as summing up the doctrine of equitable conversion in both its forms—that resulting from a contract for the sale of land,[77] and that resulting from a direction in a

[71] See § 18.
[72] See § 162.
[73] Sparks v. Woodstock Iron, etc. Co., 87 Ala. 294, 6 South. 195.
[74] See § 188.
[75] See §§ 148-150.
[76] See § 152.
[77] See § 36.

will or otherwise that land be sold and turned into money, or that money be invested in land.[78] These are the most important instances that are clearly to be referred to this maxim. Two other cases may serve to illustrate its effect. A contracted to become a citizen of London, but died before the agreement was formally carried out. By the customs of London, the estates of its deceased citizens were distributed in an entirely different manner from that prescribed by statute for other parts of England. The court, on the suit of his widow, distributed his estate in accordance with the London custom, as if he had already become a citizen.[79] B agrees to execute a mortgage to C on certain land. The contract is treated, in fixing C's rights, as if it had already been carried into effect, and C is given an equitable lien on the land.[80]

228. **Equality is equity.**—A few examples will illustrate the application of this maxim. Whenever as the result of an equity suit there is a fund to be distributed among several claimants, and it is not large enough to satisfy all claims, it will be distributed pro rata; unless, of course, some of the claims are secured and others are unsecured. The maxim, therefore, is applied in the settling of the affairs of an insolvent partnership or corporation, and in creditors' suits in behalf of more than one creditor. In

[78] See § 143.

[79] Frederick v. Frederick, 1 P. Wms. 710 (Eng.), 1 Scott, Cases on Equity, p. 311. See also Sourwine v. Supreme Lodge, 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532, 1 Scott, Cases on Equity, p. 320, LEADING ILLUSTRATIVE CASES.

[80] See § 162.

administering the estates of deceased persons, equity at an early date disregarded the common law preference given to bond or specialty creditors. So, where there is a single claim against several debtors, equity if it has jurisdiction will apportion the burden among them, or if one is compelled to pay more than his share, will give him the remedy of contribution against the others.[81] Thus, legacies or devises of the same class abate proportionally for the payment of debts. The maxim is also illustrated by the tendency of equity to prefer an ownership in common to joint ownership, and a joint and several to a joint liability. Its rules on these subjects have to a large extent been incorporated in modern statutes.[82]

229. **Inadequacy of remedy at law as test of jurisdiction.**—In conclusion, we may review, briefly, the general principles by which are determined the question whether equity will take jurisdiction of a case. The cardinal rule, as we saw at the beginning,[83] is that equity will not take jurisdiction where the legal remedy is full, adequate, and complete. Often this question cannot arise, since the law affords no remedy whatever, as in cases to enforce an equitable interest—such as a trust—which the law knows nothing of. But in a majority of cases this preliminary question must first be settled; and it is frequently a question of difficulty.[84] There is no general test of adequacy of the legal remedy; each rem-

[81] Pomeroy, Equity Jurisprudence, §§ 406, 407, 410, 411; and § 99, as to contribution.

[82] Pomeroy, Equity Jurisprudence, §§ 408, 409.

[83] See § 12, and following.

[84] E. g., Cancellation of instruments, § 65.

edy, as we have seen, has its own set of rules. The inadequacy may consist in the difficulty of ascertaining damages; in the fact that damages, when ascertained and paid, do not truly compensate; in the fact that the legal procedure does not afford protection from unjust suits (interpleader), or that the suitor is in danger of losing his rights through loss of evidence; or that if left to the law, he will be involved in a multiplicity of suits. The special rules of equity on the subject are rarely arbitrary; sometimes, for simplicity's sake, the court tests the case not on its individual merits, but on the merits of the class to which it belongs;[85] usually it takes each case as it comes, and compares the equitable remedy sought with the available legal remedies in a spirit of practical common sense, guided, but not hampered, by precedents.

230. **Jurisdiction, once taken, extends to the whole controversy.**—This principle we have already had illustrated several times; it is of constant application, in nearly every kind of suit. Thus, if the court has taken jurisdiction to enjoin waste[86] or nuisance[87] it may, in addition to issuing the injunction, retain the case and award damages for the past injury, though these damages could be obtained in a separate action at law. The legal remedy is inadequate in that it requires a separate proceeding, in addition to the equity suit. So, in an action to

[85] E. g., the rule that land contracts may be specifically enforced, though in the individual instance damages sometimes might be an adequate remedy; § 13.

[86] See § 41.

[87] See § 50.

reform an instrument the court often retains the case for recovery of the amount due upon the instrument, or for other relief.[88] It is seldom, however, that equity awards damages alone. An instance of importance is where the plaintiff's suit for specific performance fails without his fault. A sues B to compel B to comply with his contract to convey Blackacre. Meanwhile, before A's suit was begun, B had rendered specific performance impossible by conveying Blackacre to C, a bona fide purchaser for value. A, at the time he began suit, knew nothing of this conveyance, and had no reason to suppose that the legal title was not in B. As A has begun his suit for a remedy, now impossible, in perfect good faith, equity will not turn him out of court, but will retain his suit for the purpose of awarding damages for B's breach of contract.[89] If, however, A was aware, at the time he began suit, that specific performance was impossible, equity will not retain the case.[90]

231. **Jurisdiction of a subject, once existing, is not lost by the enlargement of legal jurisdiction.**— Where the courts of law have extended their jurisdiction over a subject which once belonged exclusively to the jurisdiction of equity, the jurisdiction of equity is not thereby destroyed. We have seen this rule illustrated in the remedy of contribution between

[88] Bidwell v. Astor Insurance Co., 16 N. Y. 263; Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431.

[89] Milkman v. Ordway, 106 Mass. 232, 253, 1 Scott, Cases on Equity, p. 119; Combs v. Scott, 76 Wis. 662, 45 N. W. 532, 2 Keener, Equity Jurisdiction Cases, p. 1194, H. & B. 682, 2 Scott, Cases on Equity, p. 357.

[90] Hatch v. Cobb, 4 Johns. Ch. 559 (N. Y.), 2 Scott, Cases on Equity, p. 343.

sureties.[91] Further, even where the power to grant a remedy is conferred upon the courts of law by statute, the equity jurisdiction which depended upon the absence of such a remedy is not taken away, unless that appears to be the clear intent of the statute.[92] Thus, statutes give the courts of law power to grant a new trial where a judgment has been obtained by fraud or accident; this has not abolished the jurisdiction to enjoin such judgments.[93] Actions to recover at law upon lost instruments are authorized by statute, but suits in equity for the same purpose are still entertained.[94] Even the bill for discovery, it is generally held, is not abolished by the modern reforms in the law of evidence.[95]

[91] See § 99.

[92] Sweeney v. Williams, 36 N. J. Eq. 627, 1 Scott, Cases on Equity, p. 141; Darst v. Phillips, 41 Ohio St. 514.

[93] See § 64.

[94] See §172.

[95] See § 116.

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Story's Equity Jurisprudence (2 vols.), after a lapse of about seventy-five years, is still a standard work. It presents the results of the English cases up to its date with all its famous author's learning, gracefulness of literary style, and entire absence of originality. It is one of the few American law books that is frequently cited by the English courts. *Bispham's* Equity (1 volume), about forty years old, is a clear and careful outline, somewhat too condensed, perhaps, but much in use as a text book for students. *Pomeroy's* Equity Jurisprudence (3d edition, 1905, in 4 vols.), thirty years old, dwells fully upon the changes made in Equity by the American courts. Its citation of authorities is very full, and, in turn, it is much cited by the courts today. Its brief treatment of Equitable Remedies was

expanded into two volumes by the present writer (1905); who also prepared a Students' Edition of Pomeroy (1907, 920 pages), by omitting part of the text and substituting briefer notes. Professor *Langdell's* learned articles in the Harvard Law Review, Vols. I and the following, are, perhaps, more likely to attract the scholar than the student or practitioner. There are several standard text books on various topics of Equity, but all are books of reference for the lawyer rather than texts for the student. Among them are *Fry* on Specific Performance (English); *Pomeroy* on Specific Performance; *High* on Injunctions; *Perry* on Trusts; *Jones* on Mortgages. Of more interest to the reader are the various case books used in law schools. Unfortunately, none of them covers the whole range of important equity topics; the ones most in use treat of very few topics indeed. *Hutchins' and Bunker's* Cases is the most comprehensive in the subjects treated. *Keener's* Cases, in three large volumes, treats of Specific Performance, Rescission, Reformation, and a few other remedies. *Ames'* Cases (2 vols.) covers much the same ground, but more briefly, and with notes of great value. There is also a collection of cases by *J. B. Scott.* Parts of the subject are treated in case books on Trusts, By *Ames;* on Mortgages, by *Wyman* and by *Kirchway;* in *Gray's* Cases on Property, Vol. VI; and elsewhere.

LAW OF TRUSTS

BY

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CHAPTER I.

INTRODUCTION AND HISTORY.

1. **Definition of fundamental terms.**—"A trust, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another."[1] The person who creates the trust is said to settle a trust upon another, and is called the *settlor* or *trustor*. He to whom the property is given in trust and in whom the legal title vests is called the *trustee*. The one for whose benefit the trust is created is called the *cestui que trust*[2] or beneficiary. The property which is given in trust is called the subject-matter or trust *res*. Thus, if A deeds to B 100 acres of land to hold in trust for C, collect the income therefrom and pay it to C, A is the settlor or trustor, B is the trustee, C is the cestui que trust or beneficiary and the 100 acres of land is the subject-matter or trust res.

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[1] Bispham, Principles of Equity (5th ed.), p. 77.

[2] Meaning literally "the one who trusts" and pronounced as if spelled cĕst-wē kuh trust. Anderson, Dictionary of Law, p. 162.

Throughout this article, wherever possible, the term beneficiary will be used in preference to the equivalent words cestui que trust, which, because of their foreign origin, are productive of confusion and difficulty to the beginner.

2. **Technical meaning of word "trust" distinguished from popular.**—Trusts as here treated should not be confused with the combinations or monopolies to which the same name is now popularly applied. Such industrial combinations were originally called "trusts" because the stock of the combining corporations was transferred to trustees to accomplish the combination. These trade combinations, however, have no essential connection with the trusteeships with which this article deals. Nor should the word "trust" as here used be considered synonymous with trust in the popular sense of entrust or confide. Not every entrusting or confiding of property to another gives rise to the relationship legally known as a trust, but only in those cases in which the one entrusted becomes the owner of the property and assumes the technical relationship of trustee does the relationship arise.

3. **Origin and history of trusts.**—Wherever man is highly civilized, business dealings are frequent and property abundant, the necessity of acting through intermediaries and controlling property through others is felt. This demand by man for the aid of others in the transaction of business has given rise to the law of agency, master and servant, and trusts.

As early as the fourteenth century in England the custom of conveying land to one "to the use of"

another had arisen.[3] Thus, A would convey land to B "to the use of A," with the object that B become the legal owner of the land but A enjoy it and take the profits. B, in the example given, was called the feoffee to uses and A the cestui que use. B owned the legal title and A owned a use. Under the system of holding land then in force this conveyance to uses gave A certain benefits and exemptions which he would not have had as the holder of the legal title. Thus, while B so held the land, A would not forfeit it for treason as he would land which he held in his own name. And by making a conveyance of land to B "to the use of X upon the death of A," A could dispose of the land after his death, although he could not at that time give the land away by will. And so, although by the Statutes of Mortmain, religious houses could not hold land, A might convey lands to B "to the use of" a certain religious corporation, which thus became entitled to the benefits of the lands, although it did not own them. So, too, the interest held by the cestui que use was not subject to dower or curtesy.

Therefore, for these and various other reasons, it was advantageous to employ this device known as a use.

4. **Same subject—Continued.**—From very early times a person might give money or other personal property to another to hold in trust and the beneficiary had a remedy at the common law. But the rights of those for whose benefit these uses in *land* were created were not at first recognized as enforcible

[3] Maitland, The Origin of Uses, 8 Harvard Law Review, 127.

by the courts, but rested for their safety only upon the honor of the man entrusted. The courts of the common law administered a system in which the rights protected were only those provided for by the writs of that court and there was no writ to protect the use.

Where the common law afforded no remedy it was the custom to appeal to the chancellor, who was the custodian of the king's conscience. And so persons aggrieved because uses in land had not been carried out for their benefit and because they could get no remedy at common law, petitioned the chancellor for relief. As early as the beginning of the fifteenth century this officer came to recognize the justice of these complaints and to enforce the use, that is, to decree that the feoffee to uses hold the land not for his own benefit, but for the benefit of the cestui que use, and that the cestui que use be allowed to take the profits. In taking such action equity was following the example of the common law courts with respect to uses and trusts in personal property, and was carrying out the first principle of equity, namely, that relief be given where justice required relief, regardless of forms and technicalities.

Thus it came about that the court of chancery, presided over by the chancellor, had exclusive jurisdiction of uses and trusts. This court and its successors have administered what are known as the rules of equity rather than the rules of the common law, and hence to this day the courts of equity or chancery are the exclusive custodians of trusts. They created uses and trusts when the common law

would not recognize the rights of the cestui que use and the cestui que trust, and they have ever since exclusively administered uses and trusts.[4]

It was long thought that the English uses and trusts were modeled after the Roman relationship known as the *fidei commissum,* in which by will property was entrusted to one to dispose of in a stated way. But later scholarship has shown that there is no such connection, and that the use and trust were substantially original creations of the English law. The trust is not now known to systems of law other than the English.

5. **Use and trust distinguished.**—The words "use" and "trust" were both known to the law before the Statute of Uses took effect in 1535. Trust was the more general term and included all obligations recognized by the courts of equity which arose from the entrusting of the legal title of property to one for the benefit of another. Trusts were at that time special and general. Special trusts were those in which the property was held for a temporary and particular purpose, with active duties placed upon the trustee, as where land was conveyed "to A to collect the profits and deliver them to B during a given period." General trusts were those in which the property was to be held permanently and the object was merely a general one, with no active duties to be performed by the trustee, as where land was conveyed "to A to the use of B," in which case B would have the right to take the benefits of the land indefinitely and A would have no duties. These gen-

[4] Reeves, Real Property, §§ 294-304.

eral trusts were also called uses. Thus technically all uses were trusts, but not every trust was a use. Although there is this distinction between the meaning of the words use and trust before the Statute of Uses, yet the words were often employed in a loose way as synonyms.[5]

6. **The Statute of Uses.**—The use (or general trust) and the special trust were both in force in England, as indicated above, until 1535. In that year the famous Statute of Uses was enacted.[6] This statute was intended to remedy the evils growing out of the system of uses and trusts. These evils were, in part, that the real ownership of land was concealed by the use, that wives were defrauded of their dower and husbands of their curtesy because there was neither dower nor curtesy in the interest of the cestui que use, that the feudal landlords were deprived of their special privileges, since the equitable interest of the beneficiaries was not subject to these feudal claims, and that creditors suffered because they could not obtain payment of their debts out of the equitable interest of the beneficiary. The use and trust were employed to accomplish fraud.

The Statute of Uses provided, in effect, that, whenever A should be given real property to the use of, or in trust for, B, the legal title to the land should pass from A to B and B should become the legal owner of the property as if no use or trust had been sought to be created. Thus, the statute aimed at abolishing entirely uses and trusts in order to do

[5] Bacon, Uses, pp. 8, 9.
[6] 27 Henry VIII, chap. 10.

away with the fraud which they had caused. It sought to render all estates in land legal estates. According to the phrase of the time, the statute "executed the use," that is, transferred the legal title to the cestui que use, the person who was before the holder of a mere equitable right, a use.

7. **The effect of the Statute of Uses.**—The Statute of Uses was construed by the courts in such a way that it did not accomplish the object which the framers of it had in mind. It was held, for reasons which it is impossible here to detail, not to apply to a number of uses and trusts, namely, among others, to uses in estates for years, to active or special uses and to a use upon a use. Thus, if the conveyance were to A "to the use of B for ten years," or to A "to collect the rents and pay them to B," or to A "to the use of B to the use of C," the courts held that the statute did not affect the use or trust, but that it remained a right enforcible in the court of chancery.[7] In these three cases, and in other instances, there was still a division of the legal and equitable title, and something in the nature of a use or trust existed. These equitable interests, held not to be destroyed by the Statute of Uses, were called trusts by the court of chancery. The word use was avoided, possibly because it was thought that to recognize the right as a use would be to encourage another act to abolish uses. The word trust was a general term employed before the Statute of Uses, and it was, after the statute, applied to those uses

[7] Ames, Origin of Uses and Trusts, Select Essays in Anglo-American Legal History, vol. 2, p. 737.

and trusts which survived the statute. Thus the trusts which form the subject of this study are the uses and trusts which survived the Statute of Uses and which have since been classed together by equity as trusts.

8. **American system of trusts taken bodily from the English.**—Prior to 1800 transactions with respect to land in the American states were simple. Large fortunes were few. There was little need for the trust. No system of equity jurisprudence worth mentioning had been developed. By the year 1800 the English law of trusts had become well developed and mature. Hence, when courts of chancery were created in the American states and the need of a system of trusts was recognized, the English system was adopted bodily. While numerous statutory changes have taken place since that time, the English law of trusts forms the base upon which the American system rests.[8]

[8] Story, Equity Jurisprudence, vol. 1, §§ 56-58.

CHAPTER II.

TRUSTS DISTINGUISHED FROM OTHER RELATIONSHIPS.

9. **Debt.**—A debtor differs from a trustee principally with respect to the subject-matter of his obligation. The subject-matter of a debt is any money out of the debtor's assets. The subject-matter of a trust is a certain, specific piece of property. One is indefinite, the other definite. A bank receiving an ordinary deposit becomes the debtor of the depositor and satisfies its duty by returning any money. It does not need to set apart the particular bills left by the depositor. On the other hand, a bank receiving bonds to hold, collect the income therefrom and pay it to A may become a trustee of them, and, if so, it must keep separate the particular bonds thus delivered to it.

This distinction often becomes important because 1. a debtor is not discharged by the accidental loss of any particular property, while a trustee is relieved from his obligation to return the subject-matter of the trust if it is lost without his fault. And likewise 2. a creditor must, in case of his debtor's bankruptcy, share equally with all other creditors, while a beneficiary of a trust is entitled to the exclusive benefit of the trust property.

The two relationships differ also as to the methods of enforcement. A creditor sues his debtor in a court

of law to recover the amount of the debt. A beneficiary brings a bill in equity to compel the trustee to perform his trust duties.[9]

10. **Bailment.**—"A bailment is the transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the property is to be redelivered or delivered over to a third person."[10] The person to whom the property is delivered is called a bailee. A warehouseman receiving goods for storage is a bailee, and so also a jeweler with whom a watch is left for repair. This relationship is like a trust in that both bailee and trustee owe a duty to use care with respect to the property in their charge, but unlike a trust because bailment deals with personal property alone and is in the nature of the claim which the custodian has against the property in his possession. A trustee is the legal owner of the subject of the trust. A bailee is not the owner of the thing bailed, but merely entitled to its possession for a certain time.

There is a further distinction, arising from the one last mentioned, with respect to the remedies available to bailor and beneficiary. For example, the depositor of goods with a warehouseman, if the goods are not returned when demanded, sues the warehouseman in a court of law and obtains judgment that he recover possession of the goods deposited. His remedy is against the goods, so to speak.

[9] People v. City Bank of Rochester, 93 N. Y. 582, LEADING ILLUSTRATIVE CASES; People v. Bank of Dansville, 39 Hun 187 (N. Y.), LEADING ILLUSTRATIVE CASES.

[10] Hale, Bailments and Carriers, pp. 5, 6.

Whereas, the remedy of a beneficiary of a trust, for a failure by the trustee to manage the trust property according to its terms, is an action in a court of equity in which he obtains a judgment against the trustee personally that he do or refrain from doing certain acts with respect to the trust property. His remedy is against the person.[11]

11. **Equitable charge.**—If A devises (that is, leaves by will) land to B, subject to a duty on B's part to pay C $100 a year, an equitable charge is created. If A devises land to B in trust to pay to C $100 a year, a trust is created. In both cases C receives an annual benefit of $100 and B receives land, but the transactions are distinguishable. The principal distinction lies in the nature of B's ownership of the land. In the case of the charge B is the absolute owner of the land, both at law and in equity, although C may, by a bill in equity, compel a sale of the land to satisfy his charge, if necessary. On the other hand, as a trustee B owns the land absolutely only in a court of law. In a court of equity, C is the owner of the land to the extent necessary to produce $100 a year. In the first instance B holds the land subject to a particular purpose. In the second, he holds for a particular purpose.[12]

Similarly, the relationships are distinguished upon the element of personal confidence. A trust implies a fiduciary relation. The trustee cannot substitute another in his place by a sale of the trust property. A charge implies no fiduciary relation. The right is

[11] Ashley's Adm'rs v. Denton, 1 Litt. 86 (Ky.), LEADING ILLUSTRATIVE CASES.

[12] Pomeroy, Equity Jurisprudence (3d ed.), note, § 1033.

against the property and the owner of the property may transfer it at will, subject to the charge.[13]

12. **Assignment of a chose in action.**—A chose in action is the "right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action."[14] For example, a promissory note is a chose in action. In all jurisdictions before recent statutory changes, and in some states yet, one buying or taking an assignment of a chose in action could not enforce it in his own name, but must sue in the name of the original owner, his assignor. The situation of the assignee of a chose in action in states maintaining this rule bears some resemblance to that of a beneficiary of a trust of a chose in action. The assignor is in some respects like a trustee. He is the legal owner of the chose in action, while the assignee is in all justice entitled to the avails of it. But the assignee's remedy to obtain the avails is not in equity, as a beneficiary's would be, but is at law by a suit in the assignor's name, except in unusual circumstances.[15] And the assignor, while holding the legal title, has no duty except a negative one, namely, not to interfere with the collection by the assignee. A trustee, of course, always has some duty, if it be no more than to deliver the property to the beneficiary.

13. **Executorship.**—An executor is the person appointed by will to collect the personal property of the deceased, pay the debts and funeral expenses

[13] King v. Denison, 1 Ves. & B. 260, 272 (Eng.).

[14] Bouvier, Law Dictionary, p. 265.

[15] Walker v. Brooks, 125 Mass. 241.

and distribute the remainder as directed in the will. The executor is like a trustee appointed by will in that he is in a relation of trust and confidence, that he is the legal owner of the personal property which the deceased has left, that certain definite property is in his charge and that he owes a duty to use care with respect to the management of the property.

But the executor differs from the testamentary trustee (that is, trustee appointed by will) in the nature of his duties of administration, the nature of the claim against him and the court in which he may be held to account. The executor has only the duties mentioned in the definition above and never any duties of investment or long continued management. If he is to invest and manage for the benefit of others, he is, with respect to those duties, a trustee. The legatee, who is entitled to claim the property finally from the executor, is, during the executor's term, in no sense the owner of the property, whereas a beneficiary of a trust is, in a certain sense, the equitable owner of the subject-matter of the trust. Probate courts have jurisdiction over executors, whereas trustees are made responsible in a court of equity. The same person may be made both executor and trustee. In that case his duties are separate. Theoretically he collects the money as executor and then pays it to himself as trustee. When an executor ceases to be such and becomes a trustee is often a difficult question to decide.[16]

14. **Agency.**—An agent does not own the prop-

[16] Ames, Cases on Trusts (2d ed.), note, p. 73; Drake v. Price, 5 N. Y. 430, Leading Illustrative Cases.

erty with which he deals. He may have the possession and management of property for the purpose of selling it, or transporting it from place to place, or doing work upon it. But he never owns the property as a trustee does. The agent is merely a tool or representative of his principal, while the trustee owns the trust property, subject to certain equitable rights in favor of the beneficiary. "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.'"[17] But agency in its present state of growth has little in common with the trust. Agency is a common law topic, while the courts of equity have jurisdiction of trusts.

15. **Guardianship.**—Courts of probate appoint guardians (or committees, as they are called in some states) for infants and persons mentally incompetent. The guardian is often said to bear the relation of trustee to the infant or incompetent, but he is not a trustee in the technical sense. The guardian has merely possession and control of the ward's property and not ownership. The relation is fiduciary in the sense that the guardian owes to the ward the utmost good faith and, like a trustee, cannot buy the property from the person whose interests he is supposed to protect. But the guardian has not the legal ownership of the property concerned which characterizes a trustee. Guardianships are dealt with in courts of probate and trusts in equity.[18]

[17] Pollock & Maitland, History of English Law, vol. 2, p. 226.

[18] Rollins v. Marsh, 128 Mass. 116, 118, LEADING ILLUSTRATIVE CASES.

CHAPTER III.

THE CREATION OF EXPRESS TRUSTS.

16. **Definitions and division of the subject.**—Having considered in the two preceding chapters the history of trusts and the distinctions between them and other similar relationships, it is next essential to discuss the methods by which trusts are created. Trusts are divided with respect to their origin into two classes, express and implied. An express trust is one based upon a written or oral statement of its creator to the effect that it is his intent that a trust shall arise. An implied trust is one created by a court of equity because of the acts or situations of the parties. It is not actually intended by them. Implied trusts are divided into two classes, resulting and constructive trusts. A resulting trust is a trust implied by law for the purpose of working out what the law considers was the presumed intention of the parties, but what was not their actually expressed intent. A constructive trust is a trust implied by law for the purpose of working out justice between the parties, regardless of their intention. Thus, if A writes out a deed by which he transfers land to B to hold in trust for C, using the words trust, trustee and beneficiary, or their equivalents, the trust is express. While if A pays for land the title to which is taken in the name of B, a resulting trust is created by law, with B as a trustee and A as a

beneficiary. And if A, while a trustee of certain land for B, buys it in for his own benefit upon a sale, a constructive trust is created by law to prevent possible fraud, and A will, if B desire, after the sale, hold the land as a constructive trustee for B. In the two illustrations last mentioned, the parties did not use the words trust, trustee or beneficiary, yet their acts were such that the courts implied a trust, in the first instance because it was presumed that the payor of the consideration must have intended to get the benefit of the land purchased with his money, and in the latter instance because it might encourage fraud to allow one in a confidential situation like that of a trustee to buy the subject of the trust.

First will be considered the acts and formalities necessary to create an express trust, and later will be discussed the cases in which courts of equity raise implied trusts.

17. **Language necessary to create an express trust.**—Any words may be used so long as they contain a complete statement of the essential terms, namely, a description of the property which is the subject-matter, the trustee, the beneficiary and the trust purpose. If no trustee is named, the court will supply that defect. It is unnecessary that the words trust, trustee or beneficiary or any technical legal words be used, and the use of such words will not necessarily give rise to a trust. The all important requirement is that the words used shall show an intent to make someone the holder of certain property for the benefit of another.

18. **Precatory expressions.**—The questions of

most difficulty in relation to the sufficiency of language to create a trust arise in connection with what are called "precatory expressions." A precatory expression is a statement of entreaty, request or recommendation. Thus, if A leaves property to B by will and then states in his will, "I request B to make a provision from this property for the needs of C so long as he lives," the expression quoted is precatory. The difficult question is, does the will give B the property absolutely, so that he can do what he wishes with it and care for or neglect C as he likes; or does the will make B a trustee of the property for C, so that it is B's legal duty to make a reasonable provision for the needs of C from the income or principal of the property? The courts answer this question by seeking to learn what was the intent of the maker of the will. That intent controls. No two cases upon this subject are alike and often apparently inconsistent decisions are found.[19] Thus in one case[20] the provision "I give, devise and bequeath all my real and personal property and effects unto my daughter, Frances Edmondson, * * * and it is my desire that she allows to my relative and companion, Anne Gregory, now residing with me, an annuity of £25 during her life," was held not to create a trust. While in another case[21] the words "I direct my wife, Amelia A. Scranton, out of the property hereinafter given and bequeathed to her by this will, to use so much thereof for the support and

[19] Ames, Cases on Trusts (2d ed.), notes, pp. 82, 87, 93, 97; Phillips v. Phillips, 112 N. Y. 197, LEADING ILLUSTRATIVE CASES.

[20] In re Diggles, 39 Chancery Div. 253 (Eng.).

[21] Collister v. Fassitt, 163 N. Y. 281.

benefit of my niece, Georgie S. Collister, as my said wife shall from time to time think best so to do," were held to create a trust.

The relation of the parties, the amount of the property involved and the other provisions of the will are among the facts which the courts consider in determining the testator's intent. The disposition of the early English cases[22] to construe practically all precatory expressions as creating trusts has not met with favor in the decisions in England and America since 1800. Such expressions are now given merely a natural interpretation.

19. **Formality necessary to create a trust.**—At common law (that is, before the enactment of any statutes upon the subject) it was possible to create a trust in real or personal property by parol (that is, orally). So long as the words used showed an intent to create a trust, it was not necessary that they be reduced to writing. This is now the rule in a few American jurisdictions.[23]

20. **The Statute of Frauds.**—But it soon became evident that to allow the creation of trusts in land by word of mouth was to encourage fraud and perjury. Hence in 1677 the English Parliament included in the famous Statute of Frauds[24] §§ VII, VIII and IX, which were designed to require written evidence of the creation of trusts in land.[25] This statute has

[22] Malim v. Keighley, 2 Ves. Jr. 333 (Eng.).

[23] Ariz., Del., N. M., Oh., R. I., Tenn., Tex., Va., and Wyo. See Ames, Cases on Trusts (2d ed.), note, p. 176.

[24] 29 Car. II, chap. 3.

[25] "VII. And be it further enacted by the authority aforesaid, That from and after the four and twentieth of June all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be

been copied, with some variations, by the great majority of American states.[26] It should be noticed that this statute has no reference to trusts of personal property. Hence such trusts may everywhere be created and proved by parol.[27] Furthermore, it is important that the statute does not affect implied trusts, that is, those arising by operation of law. Thus, if A pays the purchase price of land which is conveyed to B, an implied trust will be raised and B declared a trustee of the land for A, irrespective of whether there is any written evidence upon which to base the trust. It is only express trusts to which the statute applies. The effect of failure to supply the written evidence of the creation of the express trust is not to make the trust void and of no effect, although the statutes frequently so state. The word "void" has universally been construed to mean "voidable." The parties may carry out the trust if they desire, but cannot be compelled in a court of law to enforce the trust unless it is evidenced by a writing.

manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

"VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

"IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect."

[26] Ames, Cases on Trusts (2d ed.), note, pp. 176-178.

[27] Hon v. Hon, 70 Ind. 135.

21. **What writing will satisfy the Statute of Frauds.**—The writing must contain a statement of the elements of a trust, the subject-matter, trustee, beneficiary and purpose. That is, it must be a complete statement. Otherwise the words used are unimportant. The writing required is not necessarily one made at the time the trust is created. It is merely a writing manifesting or proving the trust. Hence it may be made at the time of the creation of the trust or at any time thereafter. It cannot ordinarily be made before the trust is created. The intent with which the writing is made is unimportant.[28] It may be made for the purpose of furnishing evidence of the trust, or for the purpose of repudiating the trust, or for no purpose connected with the trust. It may be addressed to the beneficiary or the settlor of the trust or to a stranger to the trust. It may be a letter, a deed, a pleading in an action, a receipt, a contract or an affidavit. The essential thing is that it be written evidence that the person signing it admits that he holds the real property in trust for another. Two or more writings may be used together, although neither one alone contains a full statement of a trust, if they are both signed by the proper party or if one is so signed and refers to the other in such a way as to incorporate that other in the signed writing.[29] The original English statute and most of the American statutes require merely a "signed" writing, that is, one in which the signature appears at any place in the writing. But a few

[28] Bates v. Hurd, 65 Me. 180, LEADING ILLUSTRATIVE CASES.
[29] Loring v. Palmer, 118 U. S. 321.

American states[30] have made the requirement of a "subscription," that is, a signing at the end of the document. The signing or subscribing must be "by the party who is by law enabled to declare such trust." This means the owner of the property at the time the writing is made, who is ordinarily the trustee. Thus, if A convey land to B upon an oral trust to hold for C, the trust will be unenforcible as an express trust after B acquires title, unless there is a writing signed or subscribed by B.

22. **Trusts created by will.**—The Statute of Wills, enacted in England in 1540,[31] required wills of real property to be in writing, and the Statute of Frauds, referred to in the next preceding section, made added requirements with respect to the signature by the testator and attestation by witnesses. Similar statutory provisions, applicable to wills of both real and personal property, are in force generally in the American states. Hence trusts created by will must meet an additional requirement as to formality. The instrument by which it is attempted to create them must be executed in accordance with the statutes respecting wills, and if not so executed, the trusts, the creation of which is so attempted, cannot take effect as express trusts.[32] As will be seen from the subsequent discussion in this article, these unsuccessful attempts to create express trusts may cause equity to create implied trusts for the purpose of working out justice. The will may, although not

[30] Calif., Colo., Ida., Mich., Minn., Mont., Neb., Nev., N. Y., Ore., Utah, Wis. Ames, Cases on Trusts (2d ed.), note, p. 179.

[31] 32 Henry VIII, chap. 32.

[32] Thayer v. Wellington, 9 Allen 283 (Mass.).

executed with sufficient formality to take effect as a will, operate as evidence of a trust previously created, of which the would-be testator was a trustee. This does not give the will any effect in creating a trust, but merely in proving one previously created.

23. **When is consideration necessary?**—Is it necessary that a trust should have been created because of some benefit conferred upon the settlor or some detriment suffered by the beneficiary? If A conveys land to B in trust for C, is it sufficient to make the trust enforcible that A entertained good will toward C and wished to benefit him, or is it necessary that C, in order to enforce the trust, should show that he has paid money to A or that he (C) has released A from a debt? If the trust is really a trust, that is, if it is completely created, it is immaterial whether it is based upon consideration or is voluntary (that is, without consideration).[33] Thus, if A perform all the acts necessary to make himself a trustee for B, or if A perform all the acts necessary to make X a trustee for B, it is no objection to the validity of the trust that A received no benefit in return for the creation of the trust. What are such acts necessary to the completion of a trust has been partially discussed above under the subjects of the Statute of Frauds and the Statute of Wills, and will be more fully discussed in the sections immediately following. But if A, the owner of property, does not create a trust in favor of B, but merely agrees to create one in the future, or if A attempts to create a trust in favor of B, but does not do all the acts necessary to such creation, or

[33] Massey v. Huntington, 118 Ill. 80.

does some of such acts defectively, then A cannot be compelled by B to create the trust or to complete his creation of the trust, nor will B have any rights to the trust property, unless consideration has been given to A.[34] This is upon the principle that equity will not aid a volunteer (that is, a person claiming something for nothing). If A has completely transferred title to B in trust for C, then it would be an unjust enrichment of B to allow him to hold the property for his own benefit and to fail to enforce the trust, even though C gave nothing for the trust. But if A is still the owner of the property, there is no unjust enrichment of anyone in allowing him to keep it, even though he has agreed to become a trustee of it for B, as long as B has not changed his position as a result of that promise.

The essential of a voluntary enforcible trust is that all the acts which the settlor is capable of doing toward the creation of the trust be done. Hence if the trust is incomplete merely because it is necessary that some one other than the settlor, as, for instance, the trustee, perform an act, the trust will be enforcible though voluntary. And, similarly, equity will not create a trust in favor of a volunteer when there has been no promise or attempt by A to create a trust for B, but merely an attempt by A to give the property to B, which attempt has failed. A gift is not valid unless it is effected by a sealed instrument or unless it is accompanied by delivery of the thing given. If neither of these essentials is present, equity will not make a trust out of the

[34] Matter of James, 146 N. Y. 78.

transaction. There is no reason for aiding the volunteer in such a way. He will be in no worse condition if the gift is not carried out than he was before it was attempted.

The better rule is that the consideration which must exist, when consideration is necessary for a trust, is what is called "valuable" consideration (that is, a property consideration), and that "good" or "meritorious" consideration (that is, one founded on relationship or affection) is not sufficient. While a seal at common law raises a presumption of consideration, the tendency of American courts and legislatures has been to do away with the effect and necessity of a seal and the better rule is that a seal is not consideration sufficient to support a trust when consideration is necessary.[35]

24. **The transfer of the property—(a) The owner makes a third person trustee.**—The very definition of a trust includes the idea that the trustee is the holder of the legal title. Hence it is elementary that where A is the owner of real or personal property and desires B to become the trustee of it for C, A must transfer the legal title to B. How this title can be transferred is more a question of conveyancing than of trusts.

If land is to be the subject-matter of the trust, title to it can only be transferred to the trustee by a written, and in some states, by a sealed instrument executed by the grantor and delivered to the grantee. If personal property is to be the subject-matter of the trust, title to it may be passed by a

[35] Perry, Trusts (6th ed.), §§ 107, 109, 111.

mere delivery of the property itself to the trustee, subject, however, to the provisions of the Statute of Frauds with respect to the sale of goods. The settlor must do every act which is necessary under the law of conveyancing, sales or gift, depending upon the nature of the property and the existence of consideration, to pass the title to the trustee. Only then will the trust be created. But the settlor may not hold the legal title to the property which he wishes to make the subject of the trust. For instance, A, the beneficiary of a trust, may desire to pass his interest as a beneficiary to B to hold in trust for C. A's title here is an equitable one. The rule, as stated above, must then be qualified to the effect that the settlor must do all that is necessary on his part to pass his title, whether legal or equitable, to the trustee. Hence in the illustration last given, A could create a trust in his equitable interest by an assignment to B, and no act on the part of A's trustee or settlor would be necessary.[36]

In states where a chose in action is not assignable, the question of the ability of an owner of such property to create a trust therein has arisen. Suppose A is the owner of a note given to him by B, can A make X the trustee of this note for Y? A cannot, in these jurisdictions, transfer the legal title in the note to X, and for that reason some courts have thought such property incapable of being the subject of a trust. But the better view is that A may transfer to X the power to collect the note in A's name, and that

[36] Sloane v. Cadogan, Sugden, 3 Vendors and Purchasers (10th ed.), Appendix, 66.

that power may be the subject of the trust in favor of Y.[37]

25. **Same subject—(b) The owner makes himself a trustee.**—If the owner elects to be the trustee himself, it is obvious that the requirement cannot be made that the settlor pass to the trustee the legal estate in the subject of the trust. The settlor already has the legal estate. Settlor and trustee are one person. The sole question then is, what evidence will the courts require that A, who has formerly held certain property for his own benefit, has now come to hold it as trustee for the benefit of A, beneficiary? The so-called "savings bank" trusts are peculiar and will be treated separately in § 27, post. With respect to other trusts the evidence must first meet the requirement of the Statute of Frauds if the property be real, that is, the evidence must be written and signed by the person enabled to declare the trust. With this exception, no particular kind of evidence is required. The sole requirement is that it clearly appear that the owner of the property intended to assume the character of a trustee. If he executes a written declaration of the trust, he need not deliver this to the beneficiary, or to anyone, but may keep it in his own possession. However, the fact that the settlor and trustee keeps the written instrument secret and in his own possession will, of course, have some probative force as showing a lack of intent to create a complete trust. All the acts of the alleged settlor and trustee with respect to the property and the beneficiary are to be considered and the question

[37] Perry, Trusts (6th ed.), § 101.

then asked and answered, "Does this evidence show clearly that the owner of the property intended to become a trustee?"[38]

26. **Are notice to and acceptance by the beneficiary necessary?**—If A deeds land to B in trust for C, or if A declares himself a trustee of land for C, is it necessary, in order that the trust be complete, that C should be notified, at the time of its creation, of the existence of the trust? It is not, and C may enforce the trust when he does learn of it, even though he was ignorant of its existence at the time of its creation and for long thereafter. In the same way, unless the trust has fastened to it burdensome conditions, it will be presumed that the beneficiary accepts it and no affirmative proof of his acceptance need be shown, in order to prove the complete creation of the trust.[39] The trust being of advantage to the beneficiary, the law presumes that he accepts it. But the absence of notice to the beneficiary will always, of course, be evidence upon the question whether the settlor intended to create a trust, and may, coupled with other facts, show that there was no complete trust.

27. **When are savings bank trusts completely created?**—The peculiarity of the law with respect to this class of trusts renders it advisable to consider separately the acts necessary to their creation. If A deposits his own money in a bank and, by A's direction, the account is entitled "A in trust for B,"

[38] Fowler v. Gowing, 152 Fed. 801, 807; Phipard v. Phipard, 55 Hun 433 (N. Y.).

[39] City of Marquette v. Wilkinson, 119 Mich. 413; Perry, Trusts (6th ed.), § 105.

the question arises whether a trust for B is really created because of this deposit, or, if not from this bare deposit, what further acts are necessary to complete such a trust. It might at first, naturally be supposed that A's direction that the deposit be placed in his name as trustee for B on the books of the bank would be a sufficient declaration to form a complete trust. But, due to various business reasons, the courts have considered such a deposit as insufficient of itself to create a trust. Savings banks sometimes pay a higher rate of interest on small deposits than on large ones. They sometimes refuse to receive deposits in one name above a certain amount. Depositors often desire to conceal their financial condition for the purpose of avoiding taxation or because of modesty. For these and other reasons there is an advantage to a depositor in dividing his deposits and placing part of his money under the name of another or under his own name in trust for another. And hence the taking out of a deposit as trustee for another does not have the clear and unequivocal meaning that is attached to the ordinary statement that one is trustee for another.

Whether A, by depositing money in an account entitled "A as trustee for B," creates a trust is a question of A's intent. A could create such a trust and he could make such a deposit without creating a trust. How is A's intent to be learned? In the first place, it may be learned by what he has said about his intent. If A clearly declares, orally or in writing, at or before the time the deposit is made, that he intends to create a trust for B by the deposit,

then such a trust will arise.[40] But a statement by A, after he has made a deposit entitled in trust for B, that he did not intend to create a trust by such act but that the money is deposited solely for A's benefit, will not be received in evidence.[41]

However, it may be that A has made a deposit entitled in trust for B without saying a word as to his intent, except that he wanted the deposit to run in trust for B. How, then, is A's intent to be learned? It will be gathered from the acts of A with respect to the deposit, aside from words. The bare act of deposit creates what the courts have called a "tentative" trust, that is, one which is established temporarily subject to destruction or confirmation as the later acts of the depositor may determine. But the deposit alone creates no trust. Upon that all the courts are agreed. The name "savings bank trusts" is applied to these trusts because their subject-matter is usually a claim against a bank of that kind, but the same rules would be applied to deposits made in other banks.

28. **Same subject—Continued.**—If the depositor die without having withdrawn the money or done any other act concerning the deposit, the courts are divided as to the result. The New York rule, followed in a majority of states, is that, by his failure to withdraw the money during his life, the depositor makes the trust complete.[42] The tentative trust seems to be confirmed or made complete by a "nega-

[40] Merigan v. McGonigle, 205 Pa. St. 321.
[41] Tierney v. Fitzpatrick, 195 N. Y. 433.
[42] Martin v. Funk, 75 N. Y. 134.

tive act." But the Massachusetts rule is that no trust is created by the deposit and death of the depositor without change in the deposit. Notice of the existence of the trust must be given to the beneficiary or some other act done to show intent. In the language of Judge Holmes, "An owner of property does not lose it by using words of gift or trust concerning it in solitude, or with the knowledge of another not assuming to represent an adverse interest. He may amuse himself as he likes."[43] Under this rule, however, no notice to the beneficiary need be given, if A has delivered the bank book to B or his representative.[44]

If the only act shown is the deposit by A as trustee for B, and B dies with the account standing as when the deposit was made, then the general holding is that the tentative trust is destroyed and A owns the account absolutely. There is no act of confirmation, and failure to notify the beneficiary before his death is deemed a revocation of the trust.[45]

If the acts shown are the deposit by A as trustee for B and notice given to B by A of the existence of the deposit in this form, then it is universally held that the tentative trust is made complete and irrevocable.[46] Notice given, not to the beneficiary, but to a third person, would, in states following the New York view, be evidence to be considered as

[43] Cleveland v. Hampden Sav. Bk., 182 Mass. 110, 111.

[44] Peck v. Scofield, 186 Mass. 108; for a collection of the authorities following the New York and Massachusetts rules, respectively, see 1 Perry, Trusts (6th ed.), p. 87.

[45] Cunningham v. Davenport, 147 N. Y. 43.

[46] Farleigh v. Cadman, 159 N. Y. 169, LEADING ILLUSTRATIVE CASES.

tending to show a completion of the trust, but in states following the Massachusetts theory notice to a third person would have no effect unless the third person represented the beneficiary.[47]

If the acts shown are deposit by A in trust for B and a delivery of the pass book to B or his representative, then the authorities are all to the effect that the tentative trust is made complete and irrevocable by such delivery.[48] And, after such delivery, a return of the book to A by B will not necessarily destroy the trust.[49]

If the only acts shown are the deposit by A in trust for B and withdrawals from the fund by A for his own use, then the trust is still tentative and A may lawfully make such withdrawals until the fund is exhausted. But if A does any act which confirms and completes the trust, such as delivery of the book to B or notice of the trust to B, then withdrawals from the account for A's benefit are unlawful and, if any are thereafter made, they have no effect on the trust. A will be responsible for the amount in the fund at the time the trust becomes complete.[50] A reservation by A of the right to withdraw from the account any part of the principal or interest during his life does not prevent the tentative trust from becoming complete and irrevocable as to the part not withdrawn by the performance of acts showing

[47] Mabie v. Bailey, 95 N. Y. 206; Cleveland v. Hampden Sav. Bk., 182 Mass. 110.

[48] Peck v. Scofield, 186 Mass. 108.

[49] Stockert v. Dry Dock Sav. Inst'n., 155 N. Y. App. Div. 123.

[50] Mabie v. Bailey, 95 N. Y. 206; Farleigh v. Cadman, 159 N. Y. 169, LEADING ILLUSTRATIVE CASES.

an intent to confirm it, such as notice or delivery of the book.[51]

If the depositor add money to the fund in the bank standing in the name of A as trustee for B, the money added takes on the character of the money already there. If the trust was tentative when the second deposit was made, the second deposit merely adds to the original tentative trust fund. If the trust had been completed and confirmed when the second deposit was made, the second deposit becomes an irrevocable trust fund also.

The prevailing view of these trusts is summed up in the following condensed statement by the New York Court of Appeals: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."[52]

29. **Acceptance by trustee unnecessary to creation of trust.**—No man can be compelled to accept a conveyance of property, whether in trust or for his own benefit. Hence if A convey land to B to hold

[51] Booth v. Oakland Bank of Savings, 122 Cal. 19.
[52] Matter of Totten, 179 N. Y. 112, 125, 126.

in trust for C, and B is not desirous of undertaking the trust, B may decline it and he will not become a trustee. But his refusal to act will not prevent the trust from being completely created. B will not become a trustee, but someone else will. Equity never allows a trust to fail for want of a trustee. Therefore, a court of equity will, if a trustee appointed by will or deed refuse to act, appoint a substitute.[53] As between the settlor and the beneficiary, the trust will be completely created as soon as the acts named above as essential have been performed, regardless of acceptance or refusal by the trustee named. And the same rule is applied if the trustee named be legally incapable of acting. For example, if a corporation named in a trust deed have no power under its certificate of incorporation to act as such trustee, the trust deed will not for that reason be invalid. Equity will appoint a substitute.[54]

[53] Braswell v. Downs, 11 Fla. 62.
[54] Willis v. Alvey, 69 S. W. 1035 (Tex.).

CHAPTER IV.

THE CREATION OF IMPLIED TRUSTS.

30. **Scope of this chapter.**—In the chapter immediately preceding the creation of so-called express trusts has been considered. Such trusts are created because of the intent of the settlor that a trust arise, expressed by written or spoken words. But there is a large class of trusts called implied trusts which are created by the courts because the parties have done certain acts or are in certain situations. While such trusts could not arise without some acts by the parties, it is essentially the decree of the court which creates the trust. These implied trusts have previously been defined as divided into two classes, resulting (arising from presumed intent) and constructive (created to work out justice). The conditions of origin of each of these classes of implied trusts will be considered in the order named. It is important to remember two facts with respect to these implied trusts. First, they are created and proved irrespective of the Statute of Frauds. It is unnecessary that there be any written evidence of an implied trust, whether it be concerned with land or personalty. This is because of the express exception of the Statute of cases "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law."

Secondly, the effect of the creation of an implied trust should be noticed. The person declared a trustee by the court is under a duty to convey the trust property to the beneficiary. The trustee of an implied trust has no duties. He merely holds for the beneficiary until he delivers the property to him. The effect is the same, whether the trust be resulting or constructive. Hence the only reason for distinguishing these two classes of trusts is one of theory and the courts often use the names resulting and constructive interchangeably.

31. **Resulting trusts—Class I: Conveyance without consideration.**—"All resulting uses or trusts will be found to be some variation of this principle, viz., that one is presumed not to be a donor of property conveyed or caused to be conveyed by him."[55] Prior to the Statute of Uses, if A owned land and conveyed it to B by one of the conveyances then in vogue, and the conveyance did not declare that B held the land for the use of another and mentioned no consideration as having been paid for it, the court of equity would declare that a use "resulted" to A. This was because it was so common at that time to hold land to the use of another that the courts presumed that every conveyance was upon a use, and the natural presumption in the case supposed would be that, if any use were to be declared, it would be in favor of A, the person who had conveyed the land to B and obtained nothing for the conveyance. After the Statute of Uses this same situation gave rise to a

[55] H. F. Stone, Resulting Trusts and the Statute of Frauds, 6 Columbia Law Review, p. 326, 329.

resulting trust. This was the original resulting trust and was based on the presumption that a man will not give away his property. Of course, the presumption of a resulting trust could be overcome by the grantee. He could prove that he had paid consideration or that he was to hold for his own benefit, but the burden was on him. The form of the conveyance raised a presumption of a trust which the presumed trustee had to overcome.

In the later history of the English common law, this form of a resulting trust became less important. The holding of land to the use of, or in trust for, another became less common and there was less room for a presumption that every conveyance was to the use of another than the grantee. Furthermore, the form of the conveyances in force changed and the old common law conveyances were displaced by conveyances operating under the Statute of Uses (bargain and sale and lease and release) and in these conveyances there was always a statement of consideration paid or of the use to which the land was to be held. Hence under these modern conveyances there is rarely, if ever, an opportunity for the presumption of a resulting trust on this ground.[56] The conveyance usually shows by its statement of consideration, which is not capable of contradiction, that the grantee is to be a holder for his own benefit, and it also generally contains a statement that the grantee is to hold for his own use or the use of a third person, which leaves no opportunity for a presumption of a trust in favor

[56] Lovett v. Taylor, 54 N. J. Eq. 311; 1 Perry, Trusts (6th ed.), § 162.

of the grantor. For these reasons trusts of this kind are practically obsolete.

Voluntary conveyances (that is, conveyances without consideration) to a wife or child of the grantor were never within this class of resulting trusts, even though no use was declared. They were governed by another principle, namely, that a voluntary conveyance to a relative of that kind was presumed to be a gift because of the duty which a husband or father has to support his wife or child.

32. **Same subject—Class II: Imperfect or illegal declaration of trust.**—If A convey by deed, or devise or bequeath by will, without any consideration, real or personal property to B in trust, and the beneficiaries of the trust are not named, or are named as to only part of the property, or the beneficiaries named are incapable of taking, or the purpose of the trust is illegal, or for any other reason the trust declared fails in whole or in part, a trust results as to the property thus undisposed of in favor of the settlor, if alive, or his successors, if he be dead. If the property be real property, the trust results in favor of the heirs of the deceased settlor; if personal property, in favor of the next of kin.[57] Thus if A, without consideration, convey land to B in trust to collect the rents and profits from one-half thereof and pay them to C during his life, and no direction is given with respect to the rents and profits of the other one-half, a trust will result in A's favor as to such one-half and it will be B's duty to reconvey one-half the land to A. Or if A by will, without consideration,

[57] Nichols v. Allen, 130 Mass. 211; 1 Perry, Trusts (6th ed.), § 160.

bequeath $10,000 to B in trust to manage for the benefit of C, and because of a violation of the statutes of the state concerned, the trust is invalid and cannot lawfully be enforced, a trust will result in favor of the next of kin of A, and B will be directed to pay to them the $10,000.

In both cases supposed, B has the legal title to property for which he has paid nothing. It would be unjust to allow him to hold for his own benefit the property which is undisposed of, or which is unlawfully disposed of. It is not to be presumed that such would have been A's intent had he realized that the trust created did not include all the property given or would be unenforcible. It is rather to be presumed that A intended that any property which the trustee, B, held subject to no lawful direction from the trust instrument, should benefit A, if living, or A's heirs or next of kin, if A be dead. Out of this presumed intent of A, equity creates a resulting trust.

It will be seen that the principle underneath this class of resulting trusts is the same as that which is the basis of the resulting trusts of the first class. In both cases the owner of property has made a gratuitous transfer of it to another in circumstances which make it fair to presume that that other should not be the owner of the property for his own benefit. A man is presumed not to give away his property. The presumption which existed in class I has now been destroyed for reasons mentioned above. The presumption existing in class II is still active and plays an important part in the

decision of cases involving imperfect trusts or trusts void because violative of the rule against perpetuities or other provisions of law.

If the trust in question be a charitable trust and fail, not because of the invalidity of charitable trusts in general, but because of the imperfect directions used to create this trust, ordinarily a resulting trust will not arise for the settlor or his successors, because equity will apply what is known as the *cy pres* doctrine and administer the property for some charitable purpose as near that of the settlor as possible. This rule will be discussed in the chapter on the purposes of public trusts.

If the testator after creating an invalid or imperfect trust, leave all the rest, residue and remainder of his property which is not disposed of otherwise to X, then there is no room for a resulting trust in favor of the testator's successors, because the subject-matter of the void or imperfect trust has been given to X under what is known as the residuary clause of the will.[58]

If the settlor direct that real property, the subject of the void or imperfect trust, be sold and converted into money, a trust will result in favor of the settlor's next of kin, because in the eye of equity the land is changed to personal property, though it has not actually been sold. This is called the doctrine of equitable conversion. And so, if the settlor directed personal property to be changed into real property, the resulting trust would be a trust of realty in favor of the heirs of the settlor.

[58] Woolmer's Estate, 3 Whart. 477 (Pa.).

33. **Same subject—Class III: Payment of purchase price by one, title taken in the name of another.** —At common law, and in the great majority of American states to-day, if A pay the purchase price of land and, by his direction, X, the seller of the land, convey it to B, a trust is presumed to result in favor of A. And the same rule applies to transfers of personal property.[59]

The reason is the same which is the basis of resulting trusts of classes I and II, namely, that the presumption is that a man does not give away his property. When A pays for the land above-mentioned, the law presumes that he intends to get something for his money. He does not get the legal title, for that goes to B, hence the courts of equity give A the equitable title. By virtue of that presumption A will get his money's worth. Otherwise he would be making a gift to B.

The trust results to A, in the illustration given, whether the consideration paid by A be money or other property. If A pays only part of the consideration and B or someone else pays the rest, a trust results in A's favor only when A has paid his part with an understanding that he is to have a definite part of the property bought, as, for example, half the purchase price, with an understanding that he is to have half the land. It is not sufficient that A has paid a part of the price with the understanding that he is to have an indefinite interest in the land. So, too, it must be A's money which makes up the purchase price. And, referring again to the example above, if

[59] Ward v. Ward, 59 Conn. 188; 1 Perry, Trusts (6th ed.), § 130.

A lend the money to B and then B pay the purchase price, no trust results to A, because it is B's money that brings about the conveyance. But if B lend the money to A, and the money is paid over to X by B directly, there is a trust resulting in favor of A, because, although B paid the money, it had, by the loan from B to A, become A's money.[60]

If A, B and C pay the consideration and property is bought in the name of X, a trust results to A, B and C jointly. If A, B and C buy the property, but take title in the name of C, he will become a resulting trustee as to two-thirds in favor of A and B.[61]

The resulting trust arises, if at all, at the time the property is conveyed. Thus, if B purchase land in his own name with his own money and later A pay to B money as the consideration for this purchase, no trust will result to A. At the time of B's purchase his holding was one for his own benefit. It cannot become a holding for A's benefit by a subsequent act of A with reference to the purchase price. A must pay the purchase price when B gets the title in order to get the benefit of a resulting trust.[62]

The payment of the purchase price by A when B takes the title raises merely a presumption of a trust. The trust is established unless there is sufficient evidence on the side of B that B was to hold for his own benefit; that is, that the transaction was practically a gift from A to B. When A is the husband or father of B this natural presumption is often overcome. The

[60] Scott v. Beach, 172 Ill. 273.

[61] Baumgartner v. Guessfeld, 38 Mo. 36.

[62] C. E. Grinell, Subsequent Payments under Resulting Trusts, 1 Harvard Law Review 185; Niver v. Crane, 98 N. Y. 40.

courts consider it reasonable to suppose that in such a case A is making a gift or advancement to B, for he owes B the duty of support and bears toward him or her natural affection. Hence, in the last named case, that of payment of the purchase price when the conveyance is to the payor's wife or child, a gift is presumed and presumptively no trust results. This presumption may, of course, be overcome and the wife or child may be shown to be a resulting trustee.[63]

Logically, class III ought to be treated as class I has been treated and all presumptions of a trust abolished, so that trusts would exist in such cases only when proven by evidence other than the mere payment of the consideration to have been intended. There is logically no more reason why a man should be presumed to intend a trust in his own favor when he pays the purchase price of land and secures a conveyance of it to another than when he conveys it directly to that other without consideration.

34. **Same subject—Class III: Statutory modifications.**—In New York, Michigan, Wisconsin, Minnesota and Kentucky resulting trusts of this class have been abolished by statute.[64] It should be noticed that these statutes apply only to real property and that they generally except cases in which the purchase

[63] Lufkin v. Jakeman, 188 Mass. 528, LEADING ILLUSTRATIVE CASES.

[64] New York Real Property Law, § 94; Hamilton v. Wickson, 131 Mich. 71; Skinner v. James, 69 Wis. 605; Stitt v. Rat Portage L. Co., 96 Minn. 27; Watt v. Watt, 39 S. W. 48 (Ky.). The New York Statute is typical and reads as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the pay-

in the name of another than the payor was made without his knowledge or consent. In the last named cases there would be actual fraud on the payor and hence a constructive trust implied by law. The rights of creditors are also excepted, so that the payment of the consideration money is presumed to be fraudulent as to them and a constructive trust is created in their favor. But the payor, himself, if he voluntarily pays money and allows the title to property he has paid for to be conveyed to another, has no rights in the property, under these statutes.

The construction given to these statutes has, however, been such as largely to draw their teeth. Thus, it has been held that if A pay the consideration for a conveyance to B upon the understanding that the conveyance is for the benefit of C, the statute does not apply and a trust exists in C's favor.[65] And, partnership realty being considered personalty, it has been held that, when a partnership pays the purchase price of realty, title to which is taken in the name of X, a trust results in favor of the partnership.[66] And so, if there is any fraud connected with

ment to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

The object of the framers of this statute seems to have been to complete the abolition of passive trusts (those in which the trustee has no duties) and so to make the searching of titles easier and safer and to prevent fraud. Notes of the revisers, Fowler, Real Property Law of New York (3d ed.), p. 1295.

[65] Siemon v. Schurck, 29 N. Y. 598.

[66] Fairchild v. Fairchild, 64 N. Y. 471.

the transaction, the courts of equity will be quick to seize upon that and imply from it a constructive trust, even though the payment of the consideration is an essential part of the fraud.[67] And if the grantee convert the real property into personal property, the latter may be reached by a resulting trust, since the statute has application only to purchases of real estate.[68]

In Indiana and Kansas the statutes apparently have a less drastic effect. They merely remove all presumption of a resulting trust when A pays the purchase price and title is taken in the name of B. A must prove the trust. The law does not imply it for him.[69]

35. **Same subject—Class IV: Payment of purchase price with fiduciary funds.**—If a trustee, with the consent of the beneficiary, purchase property with trust funds and take the title in his own name, but not as trustee, a trust will result in the property so purchased in favor of the beneficiary. And the same principle applies to agents, guardians, executors and other persons occupying fiduciary relations who are not strictly trustees. If the purchase is made without the consent of the beneficiary, a trust is created, but it is not a resulting trust, but rather a constructive trust.[70]

The resulting trust of this class is based on the idea that the beneficiary has paid the purchase price

[67] Jeremiah v. Pitcher, 26 N. Y. App. Div. 402; affirmed, 163 N. Y. 574.
[68] Robbins v. Robbins, 89 N. Y. 251.
[69] Glidewell v. Spaugh, 26 Ind. 319; Hanrion v. Hanrion, 73 Kans. 25.
[70] Whaley v. Whaley, 71 Ala. 159; Barger v. Barger, 30 Ore. 268, 274; Hanson v. Hanson, 78 Neb. 584, 592.

and, therefore, ought to have the benefit of the thing purchased. Thus it appears that this class of resulting trusts is merely a subdivision of class III. In both classes III and IV the person in whose favor a trust results has paid money for property which has been conveyed to another. In class III the payor was the legal owner of the consideration paid. In class IV the payor is the equitable or beneficial owner of it. In both cases it is a proper presumption that the payor intended the purchase to be for his benefit, and not for the benefit of the taker of the legal title. Out of that presumption in both cases the trust arises.

By far the larger number of cases involving purchase of property with trust funds are cases where the trustee uses trust funds to buy property for himself wrongfully and without the knowledge of the beneficiary. In such cases the beneficiary has his option of electing to consider the property bought the subject of a constructive trust in his favor or of holding the trustee personally liable for the amount of the trust fund misappropriated, with a lien on the property bought. This subject will be further considered in the sections on constructive trusts and on the remedies of the beneficiary.[71]

36. **General theory underlying constructive trusts.** —Of the two classes of implied trusts, resulting trusts have been considered in the preceding sections. It has been seen that courts of equity create them because of a presumption that the parties must have intended that they should arise. It remains to con-

[71] See §§ 37, 39-40, 84.

sider constructive trusts. These trusts are sometimes called involuntary trusts or trusts *ex maleficio*. They arise because the courts of equity consider them necessary to work out justice between the parties. They arise irrespective of the intent of the parties and generally quite contrary to their intent. Whenever a court of equity finds A holding the legal title to property which in all fairness and justice belongs to B, it will adjudge A to be a constructive trustee of it in B's favor.[72] Equity might in many cases equally well decree immediately that A convey the property to B, but that is not the theory adopted. The constructive trust will result in a conveyance by A to B, but such a trust is the first step to that conveyance. These trusts arise in a great variety of ways. Equity is not restricted by any well-defined rules in their creation, but will construct a trust of this kind whenever necessary to accomplish justice. These trusts are not true trusts, but are merely instruments of equity to accomplish the ends of justice. They are purely passive; that is, the trustee has no duty except to deliver the property to the beneficiary. The only difficult problem with respect to them is the problem of their origin. In what cases will equity create a constructive trust? This is a question of equity jurisdiction rather than of the law of trusts, and hence no attempt will be made here to do more than to give illustration of the more important instances in which these trusts arise. It should again be noted that to this class of trusts, as to all implied trusts, the Statute of Frauds has no

[72] Hendrix v. Nunn, 46 Tex. 141; 1 Perry, Trusts (6th ed.), p. 261.

application. Written evidence is not necessary to their origin.

37. **Actual fraud or other wrongdoing.**—The simplest instances of constructive trusts are those of trusts arising from actual wrongdoing. "Wherever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, by deed or by will, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and order him to account upon equitable principles, and to make a reconveyance of the property."[73] Thus, if A, through misrepresentation or the suppression of a fact which it was his duty to state, procure from B a conveyance of B's property, and B has no adequate remedy at law, equity will construct a trust for B's relief and, after creating the trust, the court will decree the conveyance of the property from A, the trustee, to B, the beneficiary.[74] The fraud here necessary has the same essentials as that which forms the foundation of the action of deceit. Or if A make a will leaving property to B upon the promise that B will deliver a part of the property to C after A's death, a court of equity will declare B a constructive trustee of the property received by the will so far as is necessary to protect C, if B refuses to deliver the proper portion of the prop-

[73] 1 Perry, Trusts (6th ed.), p. 268.
[74] Bacon v. Bronson, 7 Johns. Ch. 194 (N. Y.).

erty to C.[75] Or if A steal property from B, and transfer it to C, who has knowledge of the theft, equity will declare that C holds the property as a constructive trustee for B because of the actual wrongdoing.[76] The element common to this class of constructive trusts is that one person has obtained through an actual wrongful act the legal title to property equitably belonging to another. Justice demands that the wrongdoer hold as a constructive trustee.

The actual fraud may exist, not on the part of the person receiving the legal title, but on the part of the person conveying it. The fraud will in such cases be against third parties, not against the person parting with the legal title. The most frequent illustrations of this variety of constructive trusts are seen in cases of fraud on creditors and fraud on marital rights. If A, while a debtor of B, transfer his property to C with the intent to defraud his creditors, and C knows of A's intent or pays nothing for the property, C will be decreed to be a constructive trustee for B, the creditor.[77] This is on the theory of an actual fraud attempted upon the third party, B. And so, if A and B are engaged to be married, and A, with the intent of defrauding his intended wife, B, of her dower rights, conveys his real property to C, who pays no consideration or has notice of A's intent, a court of equity will declare that C hold the property under a constructve trust for B for the purpose

[75] Dowd v. Tucker, 41 Conn. 197, LEADING ILLUSTRATIVE CASES.
[76] Newton v. Porter, 69 N. Y. 133.
[77] Metcalf v. Moses, 161 N. Y. 587.

of protecting her dower rights.[78] This, too, is a trust growing out of the desire of equity to prevent fraud.

It is under this head that trusts arising from the misappropriation of trust funds should be placed. The resulting trust arising from the investment of trust funds in the name of the trustee individually with the consent of the beneficiary has been previously noticed. There is no fraud in such a transaction. But if the investment is without the beneficiary's consent, there is fraud and that fraud will enable the beneficiary to fasten a constructive trust upon the property bought, so long as it is in the trustee's hands or the hands of anyone except a purchaser for value without notice of the trust.

38. **Violation of voidable oral promise as fraud.** —It is not, as a general rule, such fraud as to give rise to a constructive trust, that one who has made an oral promise, voidable under the Statute of Frauds, refuses to perform it. Thus, if A convey land to B without consideration and upon the oral promise of B that he will hold it in trust for A, and B repudiate the oral promise and refuse to hold in trust, equity will not, according to the weight of authority in this country, declare B a constructive trustee. B's promise is unenforcible under the section of the Statute of Frauds which declares that trusts in lands must be proved by writing. The view of these courts is that to refuse to do what the law will not compel a man to do is not fraudulent.[79] The

[78] Youngs v. Carter, 10 Hun 194 (N. Y.).

[79] For a collection of the authorities, see 15 Am. & Eng. Ency. of Law, (2d ed.), pp. 1192, 1193; 6 Columbia Law Review 326.

American courts in a few states, such as Indiana, and the English courts, create a constructive trust in this situation. And generally such a trust will be constructed by equity if B did not intend to perform his oral promise when he obtained the conveyance, or was guilty of any other fraud at that time; or if the expression of the trust was omitted from the written deed by mistake; or if B occupied a confidential relation toward A, such as that of guardian or attorney. But the mere violation of the oral agreement, without any attendant circumstances, is not such fraud as to cause equity to interfere by the creation of a constructive trust.[80]

Another provision of the English Statute of Frauds quite generally adopted in this country is that no interest in lands, except short leasehold interests, can be created without writing. The question often arises whether the breach of an oral promise, the performance of which would result in the creation of an interest in lands, will be viewed by equity as such fraud as to give rise to a constructive trust. The answer generally given is in the negative. Thus, if A agree orally with B that B shall act as A's agent and buy land for A with A's money, and B, instead, purchase the land for himself with his own money, equity will not as a general rule declare B a constructive trustee of the land for A. And if A agree orally with B that B shall purchase land in B's name with B's money and later convey it to A or give A an interest therein, and, instead, B buys the land and holds it entirely for himself, as a general rule

[80] Patton v. Beecher, 62 Ala. 579; Lawson v. Lawson, 117 Ill. 98.

equity will not declare B a constructive trustee for A. But if A, prior to the agreement with B, ~~have~~ an interest in the land in question, and fail to protect it, relying on B's oral promise to buy the land and hold it according to the terms of the promise, then equity will interfere and protect A by a constructive trust. But the breach of the oral promise, voidable under the Statute of Frauds, without more, is not fraud of the kind sufficient to cause the creation of a constructive trust.[81]

39. **Fraud presumed—(a) Fiduciary transactions with respect to trust property.**—It is not only in cases where there is actual fraud that the constructive trust arises. In many instances fraud is so apt to exist that equity presumes it exists. Certain transactions are so open to fraud and unfair dealing that equity discourages them, even though in individual cases no injustice might occur. The most common of these transactions are those in which a fiduciary is concerned. The word "fiduciary," as here used, includes not only a trustee of the technical kind, but quasi-trustees, such as agents, guardians, executors, partners, attorneys and others. It is a cardinal rule of equity that such a person will not be allowed to do any act with respect to the property in his charge in which his individual interest may conflict with his interest as a representative. Thus, if A, a trustee for B, directly or indirectly buy the trust property for his own benefit at a sale of it, even though he give a fair price for it, he may be, at the election of B, declared a constructive trustee

[81] Burden v. Sheridan, 36 Iowa 125; Watson v. Erb, 33 Oh. St. 35.

of the property in favor of B. The beneficiary, B, may allow the sale to stand or avoid it, at his option. And the same rule applies to a purchase by a fiduciary of a claim against the trust property owned by a third person and to the making of any profit from the trust relation. The fiduciary must act for the beneficiary alone. If he acts for himself, his acts may be set aside, at the wish of the beneficiary, through the use of a constructive trust. This is because of a conclusive presumption of fraud which equity creates. It is of no use that the fiduciary show that his acts have been fair and the price paid reasonable. If the beneficiary choose, the property in the hands of the fiduciary may be made subject to a constructive trust.[82]

40. **Same subject—(b) Contracts between persons upon an unequal footing.**—Contracts and conveyances between trustee and beneficiary, guardian and ward, executor and legatee, attorney and client, persons closely related and normal and weak-minded persons are subject to close scrutiny by courts of equity. There is a presumption that the stronger and more influential of the two will get an advantage over the weaker. Therefore, it is held that, if a beneficiary of a trust convey property to his trustee, the transaction is presumptively fraudulent and, unless the trustee can show that he has used the utmost good faith, the beneficiary will be allowed to compel the trustee to hold as constructive trustee for him. The presumption of fraud in this case is not con-

[82] King v. Remington, 36 Minn. 15; Church v. Winton, 196 Pa. St. 107, LEADING ILLUSTRATIVE CASES; Case v. Carroll, 35 N. Y. 385.

clusive, as is that with respect to dealings with the trust property by the fiduciary. The presumption here is rebuttable, and if the trustee, guardian, attorney or other fiduciary can prove that he paid full value for the property he has acquired and that the beneficiary, ward or client acted in complete freedom and was not defrauded, the fiduciary may hold the property. In certain cases, namely, those of contracts between trustee and beneficiary, guardian and ward, and attorney and client, the relationship alone is sufficient to throw the burden on the fiduciary of proving fairness. In other instances, as when the parties are husband and wife or normal person and weak-minded person, no such burden of proof is cast on the stronger, unless there are additional circumstances pointing toward fraud.[88]

[88] McParland v. Larkin, 155 Ill. 84; Allore v. Jewell, 94 U. S. 506.

CHAPTER V.

THE TRUST PURPOSE—PRIVATE TRUSTS.

41. **Trusts classified with respect to purpose.**—Having seen what acts are necessary to the creation of trusts, it is next necessary to discuss the purposes for which trusts may be and are created. From the point of view of purpose trusts are first classified as private and public. Public trusts are also called charitable trusts. A private trust is a trust created for the benefit of a definite individual or individuals. Thus, a gift by a father to a trustee to hold in trust for his son is a private trust, the son being a definite, ascertained person. A public or charitable trust is one in which the beneficiaries are indefinite individuals who are to be selected from the whole public or from a certain large class of the public by the trustees. Thus, a gift to A in trust to supply clothing to the needy children of the village of X is a charitable trust, since those children are not definite, ascertained persons, but their identity depends upon the judgment of the trustees. The various kinds of private trusts will first be discussed and then charitable trusts will be examined. Trusts are also classified as to purpose as active and passive trusts. Active trusts are also known as special trusts, and passive trusts are frequently called general, dry or naked trusts. An active trust is one in which the trustee has duties to perform. Thus, the ordinary trust to

hold real estate and collect and distribute the rents and profits is active. A passive trust, on the other hand, is a trust in which the trustee is not charged with any duties, but merely acts as a holder or receptacle of the legal title. Thus, if A convey property to B "in trust for C," without any mention of B's duties respecting the land, B will be a passive trustee. Express trusts may be either active or passive. Implied trusts are practically always passive. Since the essential feature of passive trusts is that they have no purpose, except the holding of the legal title by the trustee, no extended discussion of them under this heading will be necessary. It will be sufficient to note the effect of certain legislation upon them. The remainder of the discussion with regard to the possible purposes of trusts will be confined to active trusts.

42. **Effect of legislation on passive trusts.**—Prior to the Statute of Uses (1535) it was very common in England to convey land to A "to the use of B." A was a receptacle of the legal title and had no active duties. B took the profits and had the enjoyment of the land. This relation was called a use and was the predecessor of the modern passive trust. The Statute of Uses, as shown by previous discussion,[84] provided, in substance, that, upon the creation of a use, the legal title should vest in the beneficial owner of the property, and, hence, after its passage, the statute executed the use, as the phrase ran. So, in the illustration above, the legal title was carried through to B by the execution of the use. The use

[84] See §§ 6, 7.

was destroyed. A passive trust could not exist under the statute, because the statute took the legal title from the trustee and gave it to the beneficiary. The courts excepted certain uses from the operation of the statute by judicial construction, but it is not necessary to consider those exceptions here. The point to be noted is that, wherever the Statute of Uses is in force, trusts passive at the time of their creation have been rendered impossible. A trust, in other words, must have a purpose; the trustee must have duties other than the mere holding of the title. The Statute of Uses, or the principle involved in it, is in force in practically all American states. Of course, the Statute of Uses and its successors have application only to real property. Hence, a passive trust of personal property is still possible. But passive trusts of real property are rare in America.[85] In states such as New York, Wisconsin and Michigan there are express statutory provisions abolishing passive trusts in land and providing, in substance, that "Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest."[86]

43. **Trust purposes valid at common law.**—At common law a trust might be created in real or personal property for any purpose, as long as there was

[85] 3 Pomeroy, Equity Jurisprudence (3d ed.), § 986, note.
[86] New York Real Property Law, § 92.

no violation of a statute or contravention of public policy. The number of trust purposes was limited practically only by the imagination of the settlor. Of course he could not create a trust to assist in treason or to aid unlawful or immoral acts, but otherwise he was unrestricted. And such is the condition in most American states to-day. The answer to the question, for what purposes may a trust be created? is, in all American jurisdictions, if the subject-matter be personalty, that it may be created for any legal purpose; and if the subject-matter be realty, the answer is the same in most American states.

44. **Statutory restrictions of the purposes of real property trusts.**—In a few states, notably New York, Wisconsin, Michigan, Minnesota, California and South Dakota, the legislatures have arbitrarily limited the purposes for which trusts in real property may be created. All trusts in real property except those expressly authorized are abolished.[87] The New York statute is the model from which the others have been drawn, and reads as follows "An express trust may be created for one or more of the following purposes: 1. To sell real property for the benefit of creditors; 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life

[87] See 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1003 and note for a collection of the authorities. See also Compiled Laws of Michigan, 1897, § 8839; Sanborn & Berryman's Statutes of Wisconsin, 1898, § 2081; Kelly's Minnesota Statutes, 1891, § 4013; California Civil Code, § 857.

of that person, or for any shorter term, subject to the provisions of law relating thereto; 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."[88] These statutes have made the law of trusts in the states named very peculiar, since the question constantly arises there, which is elsewhere unheard of, namely, is the purpose of the trust an authorized purpose?

45. **Effect of attempt to create unauthorized trust.**—In a majority of the states named as having statutory restrictions upon the purposes for which express trusts in real property may lawfully be created, an attempt to create a trust not authorized is not a nullity and of no effect. The attempted trust cannot be permitted to take effect as a trust because of the prohibition of the statute, but by the same statute it may take effect as a power in trust.

The provision in the state of New York is typical of the provisions generally prevailing in states having the statutory systems of trusts. It reads as follows: "Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or

[88] New York Real Property Law, § 96.

descend to the persons otherwise entitled, subject to the execution of the trust as a power.[89] A power may be roughly defined as an authority to do an act in relation to property which an owner of it might do. A power in trust is a power to do an act for the benefit of others than the holder of the power. The effect of an attempt to create an unauthorized trust in these states may be illustrated as follows: If A devise real property to B in trust to divide the land between X, Y and Z, the trust cannot take effect because no trust to partition lands is authorized by the statute. But the will does not entirely fail. The property devised to B descends to the heirs of A, upon his death, and B becomes the holder of a power over the lands to partition them between X, Y and Z. The legal title to the lands is in the heirs of A, not in B, as it would have been if a valid trust had been created, but the heirs hold the lands subject to a power in B to divide the lands and transfer the proper shares to X, Y and Z. The same result is accomplished by the power in trust in the hands of B as would have been accomplished by a trust to partition. It is simply a distinction in the method. For the purpose of simplifying the records of titles to land by a reduction in the number of trusts, these legislatures compel a resort to powers rather than trusts, except in cases where it is either necessary or highly convenient for the actor to have the legal title.[90]

[89] New York Real Property Law, § 99.

[90] Compiled Laws of Michigan, 1897, § 8842; Sanborn & Berryman's Statutes of Wisconsin, 1898, § 2084; Cooke v. Platt, 98 N. Y. 35, 38.

46. **Restrictions on the purposes of trusts through the rule against perpetuities.**—The purposes for which trusts may be created are somewhat restricted by a rule of the law of property known as the rule against perpetuities. The English rule of this name, and the prevailing rule in this country, is that future interests in property must vest within a certain limited period, namely, during the existence of lives in being and twenty-one years thereafter.[91] No interest in property may be created in any way which will be contingent for a period longer than one measured by the duration of some life or lives in being at the time the interest is created and twenty-one years after the cessation of such life or lives. The object of the rule is to prevent property from becoming unduly burdened with possible and contingent interests and to promote its marketability as an object of commerce at a fair price. As applied to trusts and the purposes for which they may be created, this rule results in the following restriction: The purpose of the trust must be such that the trust will arise within the statutory period; that is, lives in being and twenty-one years. For example, a gift to trustees to hold upon certain trusts, to begin when a certain gravel pit is worked out, is void as violating the rule against perpetuities, because the gravel pit may not be worked out within lives in being and twenty-one years, and hence the equitable estate of the beneficiary may not vest until too remote a period.[92]

[91] See Gray, Perpetuities (2d ed.), §§ 728-752, for a statement of the statutory changes in the United States.

[92] In re Wood, (1894) 2 Ch. 310 (Eng.); Gray, Perpetuities, § 413.

A trust does not violate the rule against perpetuities in this sense, in case it may last indefinitely. In such circumstances there is no suspension of the vesting of any interest, legal or equitable. A trust may, in a certain indirect sense, violate this rule, however, if it last longer than lives in being and twenty-one years, and then a contingent remainder is limited after it. For example, if A give property to B to hold in trust for 200 years, and at the end of that time the property is to go to the eldest male descendants of B then in being, in fee simple, the gift to the descendants would be void, because it could not vest within lives in being and twenty-one years. Not until 200 years would it be known who the remaindermen were. But the trust to B would not itself be void. The interests under it would all be vested. Yet because it would last longer than lives in being and twenty-one years it vitiates the remainder following it.

In a number of American states an entirely different view of the meaning of the rule against perpetuities has been taken. The statutes of New York, Wisconsin, Michigan, California and a number of other states treat this rule as one against suspending the power of alienation for an undue length of time. Such states consider the rule violated when, for too long a period, there is no one in being who can convey the complete title to the property in question. This interpretation of the rule, coupled with the provisions of the statutes in a number of these same states that the interest of the beneficiary of a trust to collect the rents and profits of property and de-

liver them to a beneficiary is inalienable, has an important effect on the law of trusts in such states. Under the last named provisions, a trust to collect and pay over the rents and profits suspends the power of alienation. Under the statutes of the same states previously referred to, the power of alienation may not be suspended longer than a given time, in some instances as short a time as two lives in being. The result is that trusts of this kind, that is, to collect and deliver rents and profits, are restricted in their duration to the period of the rule against perpetuities. Thus, in New York, if land be devised to A in trust to collect the rents and profits and deliver them to X, Y and Z, or the survivor or survivors of them, until the longest liver of them die, the trust will be void as violating the rule against perpetuities, because the interests of X, Y and Z are inalienable and hence the power of alienating the property which is the subject-matter of the trust is suspended for three lives, whereas the rule against perpetuities allows such power to be suspended only during two lives in being.[93] These two rules, in the states following the New York statutory system of trusts, restrict seriously the purposes for which trusts may be created.[94]

47. **Restrictions on the purposes of trusts through the rule against accumulations.**—A second rule which the framers of trusts must bear in mind as restricting their liberty is called the rule against accumulations.

[93] Central Trust Co. v. Egleston, 185 N. Y. 23.

[94] For examples of the form of these two varieties of statutes, see New York Real Property Law, §§ 42, 103, and Woodgate v. Fleet, 64 N. Y. 566.

It is to the effect that the income of property shall not be accumulated and the ownership of such accumulation suspended for too long a period. This rule is a corollary of the rule against perpetuities. It is aimed against the hoarding of the income of property without the existence of a right of enjoyment in any living person. Just how long this accumulation may take place and the vesting of the ownership of the accumulated sum may be suspended is variously decided in the several jurisdictions. In England four lawful periods of accumulation are now fixed, namely, during the life of the giver, during twenty-one years after the giver's death, during the minorities of any persons living at the giver's death, or during the minorities of persons who would be entitled to the income of the fund. Any one of these periods may be used.[95] This statute seems to have been followed closely in Pennsylvania.[96] In the majority of American states the period of lawful accumulation is the same as that in the rule against perpetuities; that is, generally, lives in being and twenty-one years.[97] In New York and the states following its system of trusts the accumulation may be only during a minority and for the benefit of a minor.[98]

Accumulations are practically always made through trusts. Hence, this rule against unlawful accumulations has an intimate bearing on the sub-

[95] The Thellusson Act, 39 & 40 Geo. III, chap. 98.

[96] Act of April 18, 1853, § 9.

[97] 1 Reeves, Real Property, § 972.

[98] New York Real Property Law, § 61; New York Personal Property Law, § 16.

ject of the lawfulness of the purpose of trusts. If A devise property to B to hold in trust for 500 years, collect the rents and profits, accumulate them, and at the end of the 500 years pay them over to the persons who would then be the heirs of A, the trust is invalid. It has for its purpose an accumulation beyond the period during which accumulations are anywhere allowed. The gift to B will have no effect and the property will go to those persons who would have taken it had the direction to accumulate and the gift of the accumulated fund both been omitted from the will. The heirs or next of kin of A will take it, in the absence of a residuary clause in the will.[99]

48. **The more common purposes of express private trusts.**—Having considered the purposes for which private express trusts may be created, it remains to enumerate the purposes for which they are commonly used, and then to discuss briefly two kinds of express private trusts which present some peculiarities. Among the more common trusts, in those states not having the statutory restrictions on purpose, are trusts "to sell, and from the proceeds to pay creditors of the settler; to sell, mortgage, or lease to pay legacies or charges; to manage, receive the net income and pay it over to designated persons or apply it to their maintenance and support; to receive the net income and accumulate it for a specified object; to sell and pay the proceeds to the settler; to receive the income and raise therefrom a jointure or marriage portion; to convey to specified persons; to par-

[99] Gray, Perpetuities (2d ed.) § 671.

tition; to mortgage or lease, and out of the proceeds to pay the settler's debts; to hold for the sole and separate use of a married woman."[1] With the exception of trusts for married women and the so-called spendthrift trusts, these trusts possess the ordinary incidents of the trust relationship and their administration and effect will be considered generally in the succeeding sections.

49. **Trusts for married women.**—At common law a husband was entitled to the absolute ownership of his wife's personal property of which he had possession and to the use of her realty during his life. It was very difficult, except through the generosity of her husband, for a married woman to obtain the use or benefit of any property during the marriage. For the purpose of protecting married women and allowing their relatives to make settlements upon them, the English court of chancery recognized trusts for the separate use of married women. Under these provisions a married woman might obtain the income of property held by a trustee, and her husband could not reach it. It was not even necessary that a trustee be mentioned in the instrument making provision for the wife. If the property was given to the married woman for her sole and separate use, the husband would be considered a trustee of it for her. It was soon held, however, that the interest of a married woman under such a trust was alienable, and the value of the trust was lessened, because the husband could easily influence the wife to alienate as he desired. But later a provision was invented and incor-

[1] Reeves, Real Property, p. 468.

porated into these trusts forbidding the anticipation of the income by the wife. Courts of equity gave effect to this clause and held it to prevent alienation by the wife. These trusts were in common use until the modern legislation giving married women property rights equal to those of single women. Since such acts have been passed, there has been little need for them to accomplish their original purpose. Quite generally throughout the United States married women may take, hold, take profit from and dispose of property without the consent or interference of their husbands. For the situation in any given state on this subject reference must be made to works on husband and wife or domestic relations.[2]

50. **Spendthrift trusts.**—A spendthrift trust is one in which the income of the property given in trust is not alienable by the beneficiary or through the efforts of the beneficiary's creditors. Thus, if A convey property to B to hold in trust for X, a son of A, and pay the income to X, during his life, and a provision be made that X may not alienate his interest under the trust, and that it is not to be subject to the claims of X's creditors, the trust is a spendthrift trust. The beneficiary has only the right to the income when paid to him. He may not anticipate the payments by a sale or mortgage of his rights, nor may his creditors levy upon the interest of the beneficiary before the payments are made to him. They must resort solely to the money in the beneficiary's hands. There are three classes of cases upon the subject of the legal possibility and the incidents of

[2] 1 Tiffany, The Modern Law of Real Property, §§ 176-178.

such trusts. First, the English view, which is that such trusts are impossible, since they attempt to give a man property without attaching to it the inevitable incidents of property, namely, alienability or saleability and liability for debts.[3] Secondly, the general American view, that such a trust is possible, and that a provision against alienability or liability for debts is not against public policy or detrimental to the rights of creditors. A man should be allowed to give to another all or a part of the rights attaching to any article of property. Creditors should inquire as to the sources of the income of their debtors and should not give credit to persons so restricted.[4] Thirdly, the rule in several states, such as New York, is affected by statutes which, without any expression in favor of inalienability on the part of the settlor, render inalienable the income of trusts to collect the income of property and deliver it to a beneficiary.[5] In some states, also, as in New York, the further statutory provision appears that creditors may reach the surplus of the income above what is reasonably necessary for the "education and support" of the beneficiary. But it has been uniformly held that

[3] Apparently followed in R. I., N. C., S. C., Ga., Ala., Oh., Ky. and Ark.; see Gray, Restraints on Alienation (2d ed.), § 178; 26 Amer. & Eng. Encyc. of Law (2d ed.), p. 138.

[4] Broadway Nat. Bank v. Adams, 133 Mass. 170, LEADING ILLUSTRATIVE CASES; see note, Ames, Cases on Trusts (2d ed.), p. 400; apparently this rule is approved in Pa., Mass., Ill., Me., Md., Miss., Vt., Mo., Tenn., Del., Ind., and Va.; Gray, Restraints on Alienation (2d ed.), § 178.

[5] New York Real Property Law, §§ 98, 103; Williams v. Thorn, 70 N. Y. 270; the following states seem to have followed New York to some extent at least in its legislation on spendthrift trusts: Ill., N. J., Tenn., Calif., Ind., Kans., Mich., Minn., N. D., S. D., Wis., Okla. See Gray, Restraints on Alienation (2d ed.), § 296; 26 Amer. & Eng. Encyc. of Law (2d ed.), note, pp. 149, 150; 2 Perry, Trusts (6th ed.), § 827a.

one may not create a spendthrift trust for his own benefit and thus set aside a portion of his property which shall not be liable to the claims of his creditors.[6]

[6] Schenck v. Barnes, 156 N. Y. 316.

CHAPTER VI.

THE TRUST PURPOSE—PUBLIC TRUSTS.

51. **Definition of charitable trust.**—The previous sections with respect to the possible and common purposes of trusts have dealt with such only as were private trusts. It remains to consider from the point of view of purpose the public or charitable trust. "A charity, in the legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."[7] The essential idea of a charitable trust is that the benefit of the trust is to be for the whole public or some large class of the public as distinguished from private persons. The beneficiaries are not named, ascertained individuals, but indefinite, unknown persons whose identity will only become known by the selection of them from the class to which they belong. This selection will be made by the trustees. This idea that the beneficiaries must be indefinite distinguishes the charitable trust sharply from the private trust. In

[7] Jackson v. Phillips, 14 Allen 539, 556 (Mass.).

that trust the beneficiaries must be certain and ascertained, otherwise the trust will fail for want of someone to enforce it. But with charitable trusts this indefiniteness is allowed. The state itself will enforce the trust for the indefinite beneficiaries. As will be seen from the succeeding discussion, charitable trusts are treated with much greater leniency by the courts of equity than are private trusts.

52. **History of charitable trusts.**—The English courts of chancery before the seventeenth century had in a number of cases taken jurisdiction of trusts for charity and had sustained them. If A gave property to B in trust for the maintenance of a free school in the village of X, chancery supported the gift from reasons of public policy and compelled B to execute the trust, even though the beneficiaries were indefinite persons. In 1601 the English parliament passed, as the culmination of a series of statutes on the subject, the famous Statute of Charitable Uses.[8] This statute enumerated in its preamble the charitable trusts in common use then and provided in its body means for the protection and enforcement of them. The preamble of this statute is often resorted to by modern courts to determine what purposes are at present valid charitable purposes.[9] It

[8] 43 Eliz., chap. 4.

[9] The purposes mentioned in the preamble as charitable were as follows: Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in university; houses of correction; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes. 2 Perry, Trusts (6th ed.), p. 1136.

is now the accepted doctrine of the American courts that charitable trusts do not depend on this statute for their existence but have ample ground for support in the general equity powers of the court of chancery. Hence it is not highly important whether this statute has been adopted as a part of the law of any given American commonwealth. It seems to have been rejected and accepted in about an equal number of states.[10]

Irrespective of the Statute of Charitable Uses, charitable trusts are generally recognized in the United States as distinct from private trusts and not subject to the same restrictions with respect to definiteness of beneficiaries and the rules against perpetuities. But a few states, such apparently as Michigan, Minnesota and Maryland, deny charitable trusts any existence except upon the same terms as apply to private trusts.[11]

53. **What purposes are charitable?**—Charitable purposes may be roughly divided into four principal groups, as follows: (1) Religious purposes. It is universally conceded that trusts to aid directly or indirectly in the establishment or maintenance of religion are charitable trusts.[12] Thus, a trust to build or keep in repair a church structure, or to distribute

[10] The statute seems to have been considered a part of the common law, reënacted or recognized in Ill., Ky., Me., Mass., Mo., N. C., N. Y., Conn., R. I., Ga., Oh., and Pa. In Calif., Del., D. C., Ind., Md., Mich., Miss., N. J., S. C., Tenn., Va., and W. Va., the existence of the statute as a part of the American law has been denied. In Ala., N. H., Tex. and a number of other states the question seems undecided. See 5 Am. & Eng. Encyc. of Law (2d ed.), pp. 899, 900; 6 Cyc. pp. 901, 902.

[11] For a collection of the American Statutes and authorities, see 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1029 and notes thereto.

[12] McAlister v. Burgess, 161 Mass. 269, LEADING ILLUSTRATIVE CASES.

bibles or other religious literature, or to assist in the support of needy clergymen or theological students, or to aid in the conduct of missions is a valid charitable trust. A trust for the purpose of having masses said for the repose of souls is generally held to be a valid charitable trust for a religious purpose.[13] (2) Educational purposes. The spread of knowledge and culture is a valid charitable purpose.[14] Therefore, trusts to aid colleges or universities, or to found and maintain libraries, or distribute literature, or to endow scholarships or professorships are valid charitable trusts. (3) Eleemosynary purposes. The relief of poverty, sickness or other distress is a valid charitable purpose.[15] Hence a trust to found or maintain an asylum, hospital or home for the feeble-minded, sick, aged, needy or friendless, or to provide privately for the relief of the poor or distressed is valid as a charitable trust. (4) Governmental purposes. The object of assisting the government in carrying out its purposes is a valid charitable object. Thus, trusts to beautify and care for parks and streets, to erect monuments for distinguished men, to construct buildings for governmental purposes or to aid in caring for the poor who are government charges, come within this class.[16] The erection of a monument or tomb is generally considered a part of the funeral expenses of a deceased person and hence properly provided for by will on that ground.

[13] Hoeffer v. Clogan, 171 Ill. 462; contra, Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327.

[14] Jackson v. Phillips, 14 Allen 539 (Mass.).

[15] Trim's Estate, 168 Pa. St. 395.

[16] Smith's Estate, 181 Pa. St. 109.

But a trust to erect and maintain a monument or care for a cemetery lot is not considered, aside from statutory authorization, a valid charitable trust.[17]

54. **Attitude of equity toward charitable trusts with impossible, imperfect or illegal purposes.**—So friendly is equity to the charitable trust that it will stretch its powers to the limit to sustain and carry out a charitable trust. The theory upon which this is done is known as the *cy pres* doctrine, these words meaning, roughly translated, "as nearly as possible." This doctrine is that, where the settlor of a charitable trust has created a trust which is unenforcible because of an imperfect statement of its purpose or because of the statement of an impossible or illegal purpose, equity will not allow the trust to fail, but will, because of its peculiar partiality to charitable trusts, enforce it for an object as nearly as possible like that of the settlor. This doctrine can be best explained by reference to the facts of an actual case. In Jackson v. Phillips[18] a testator gave property to trustees "for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in this country," and "for the benefit of fugitive slaves who may escape from the slave holding states of this infamous Union from time to time." The testator died in 1861, but shortly thereafter slavery was abolished and the executor sought the advice of the court as to the validity of the trusts

[17] 2 Perry, Trusts (6th ed.), § 706 and note.
[18] 14 Allen 539 (Mass.).

attempted to be created. The court held that, while the trust as originally created was a valid charitable trust, its enforcement exactly as planned by the settlor was then impossible, and the court would apply the *cy pres* doctrine and enforce it as nearly as possible. This was done by directing one sum to be used to promote the education, support and general welfare of freedmen and another for the aid of necessitous negroes in Boston and vicinity, preference being given to such persons as had escaped from slavery. Thus, the testator's intent was carried out as nearly as possible in the unforeseen circumstances.

This *cy pres* power of the court is of two kinds, the prerogative *cy pres* and the judicial *cy pres*. The former is in use only in England and there rarely. It is based on the authority of the crown, exercised through the court of chancery, to dispose of property, the subject of an unenforcible gift to charity. Thus, if the giver name no trustees, or the trustees named are dead, and the gift is made generally to charity, with no mention of specific forms, or if the gift be to a charity which is illegal at the time the settlement is made, equity will exercise the prerogative *cy pres* power and dispose of the gift for a valid charity. For example, the English courts have held that a gift of property to a trustee, who died before the trust could be enforced, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters," gave cause for the application of the prerogative *cy pres*.[19] And so a gift to a trustee

[19] Moggridge v. Thackwell, 7 Ves. 36 (Eng.).

to educate poor children in the Roman Catholic faith, being illegal in England, afforded another instance of the use of the prerogative *cy pres*.[20]

The judicial *cy pres* is the power more frequently used and is recognized in the majority of American states.[21] It is commonly exercised when there is either a gift to trustees for charitable purposes which are imperfectly described, or where the purpose of the trust cannot be carried out, due to a change in circumstances.[22] This *cy pres* power is one based on the authority of the court of equity and not a power delegated by the legislature or executive.

55. **The purposes of charitable trusts as affected by the rules against perpetuities and accumulations.** —In those states in which the rule against perpetuities is a rule that interests must not vest at too remote a period, the question as to the application of the rule to charitable trusts may arise in three ways. A gift to trustees for charity may be followed by a gift to an individual upon the happening of a contingency. It is generally held that the rule applies here and the gift to the individual will be void if the contingency may happen at too remote a time, that is, after the end of lives in being and twenty-one years. A gift to an individual may be followed by

[20] Cary v. Abbot, 7 Ves. 490 (Eng.).

[21] The judicial cy pres apparently is adopted in whole or part by legislation or as a part of the common law in Calif., Ill., Ind., Mass., Mo., N. H., R. I., Utah, Me., Ky., Ohio, Pa., N. Y., Conn., and Ga. It seems to be rejected in Iowa, S. C., Tenn., Ala., Del., N. C. and Wis. See, for a collection of authorities, 5 Amer. & Eng. Encyc. of Law (2d ed.), pp. 942, 943.

[22] For illustrations of its workings, aside from that given in Jackson v. Phillips, 14 Allen 539 (Mass.), see Dailey v. New Haven, 60 Conn. 314 and DeSilver's Estate, 211 Pa. 459; Darcy v. Kelley, 153 Mass. 433, LEADING ILLUSTRATIVE CASES.

a gift to a trustee for charity upon the happening of a contingency. In this case also it has generally been held that the rule applies and the gift over to the trustees for charity will be void if it may occur at a time later than the expiration of lives in being and twenty-one years. Lastly, a gift to trustees for charity may be followed by another gift to trustees for charity upon the happening of a contingency. Here there is an exception and the rule against perpetuities does not apply. The second gift to charity may be upon a contingency which may not happen till after lives in being and twenty-one years have expired.[23]

In those states where the rule against perpetuities means something entirely different, namely, that the power of alienation may not be suspended for too long a period, the exception with respect to charitable trusts is complete. Even though property be given to A under a trust for charity to last indefinitely and the interest of the beneficiaries is not alienable, both because of the statutes prohibiting alienation of the interest of a beneficiary and because the indefiniteness of the beneficiaries prevents alienation practically, yet there will be no violation of the rule against perpetuities and the charitable trust may go on forever. This is because the courts arbitrarily except this form of trust from the operation of the rule.[24]

With respect to the legality of provisions that the income of property given in trust for charity shall

[23] Gray, Rule Against Perpetuities (2d ed.), §§ 589-603i.
[24] Allen v. Stevens, 161 N. Y. 122.

be accumulated for an indefinite time, there is a conflict of opinion. The English courts have held that such provision for accumulation beyond the time allowed by the rule against accumulations is bad and the income must be paid to the charity as fast as it arises.[25] Some American courts have held that such accumulations will be allowed within limits to be prescribed in each case by the courts of equity. No interference with the accumulation will take place unless it is unreasonable, unnecessary and to the public injury.[26] In at least one American state the statute forbids accumulations for charity.[27]

[25] Harbin v. Masterman, (1894) 2 Ch. (C. A.) 184 (Eng.); (1895) A. C. 186. See generally Gray, Rule Against Perpetuities (2d ed.), §§ 679, 679a.

[26] St. Paul's Church v. Att'y General, 164 Mass. 188; Woodruff v. Marsh, 63 Conn. 125, 137, 138.

[27] St. John v. Andrews Institute, 191 N. Y. 254.

CHAPTER VII.

THE TRUSTEE — HIS APPOINTMENT, QUALIFICATION AND POWERS.

56. **The essential elements of a trust stated.**—In every true trust there is a settlor, property which is the subject-matter of the trust, a trustee and a cestui que trust or beneficiary. Having discussed the methods by which trusts are created and the purposes for which they may be and are formed, it is next necessary to consider separately each of the four essential elements of a trust and the powers, rights, duties and liabilities connected therewith. The settlor and subject-matter may be dismissed with a short discussion, but the trustee and beneficiary require fuller examination. The settlor or creator of a trust may be any person capable of making a contract, except in cases when the settlement is made by will, when, of course, the creator must satisfy the law with respect to the capacity to make wills. Thus, the federal government or any state government may create a trust. Infants may settle property in trust, but their settlements will be voidable at their option, just as their contracts are voidable. Married women are now generally relieved from their disability to convey property and hence may create trusts as freely as men or unmarried women. The property of a bankrupt is vested in his trustee in bankruptcy by the adjudication of bankruptcy. Hence the bankrupt cannot declare a

trust of property acquired before the bankruptcy. A corporation may create trusts in so far as they are within the powers given it by its charter or certificate of incorporation. The beneficiary of a trust may create a trust in his equitable interest. Aliens are now quite generally relieved from their disability to hold real property and to convey it, and may hence make a valid conveyance of it, as well as of personal property, in trust. The conveyance of property in trust by a lunatic or other person of deranged or feeble mind is treated as are the contracts of such persons. It is voidable only and, unless avoided, creates a valid trust.

The trust property may be property of any sort, real or personal, legal or equitable. It may be, for example, money, land, a bond, a mortgage, a claim against a bank or a stock of goods.[28]

57. **Who may be a trustee.**—Any person capable of taking and holding real and personal property may be a trustee. Of course, persons possessing such power may have defects which will cause a court of equity to remove them, but such power gives them the ability to become trustees. It is the prevalent view that the United States or a state may become a trustee, if it sees fit to accept a trust. The remedy of the beneficiary in such a case will be by petition, rather than suit, since the sovereign cannot be sued.[29] Aliens and married women are now generally capable of taking and holding all property and hence may become trustees. Non-residents, while discrim-

[28] 1 Perry, Trusts (6th ed.), §§ 28-37.
[29] 1 Perry, Trusts (6th ed.), § 41.

inated against in the appointment of trustees by the court, are not disqualified and a statute requiring trustees to be residents of the state is unconstitutional.[30] A corporation may be a trustee if the purposes of the trust are within the purposes for which the corporation was created. Infants and insane persons may become trustees, but their incapacity to perform binding acts will ordinarily cause equity to remove them. So, too, a bankrupt may become a trustee, for he has the capacity to take and hold property, but his financial irresponsibility will generally make expedient his removal by the court. The same person cannot be both sole beneficiary and sole trustee, because of the doctrine of merger, by which the legal and equitable estates unite when they come together in the same person. But one may be trustee for himself and others or may be one of several trustees for himself.[31] It is the policy of equity not to appoint as a trustee one who is defective or abnormal in any respect. Hence there is a presumption against the appointment of near relatives, who might be prejudiced, infants, women (in states where married women are under disabilities), bankrupts and such persons. Old age, drunkenness and friction have been considered sufficient causes for the removal of a trustee.[32]

58. **Trust will not fail for want of a trustee.**—It is a fundamental principle of equity that a trust will not be allowed to fail for want of a trustee. Hence

[30] Roby v. Smith, 131 Ind. 342.
[31] Burbach v. Burbach, 217 Ill. 547.
[32] Ames, Cases on Trusts (2d ed.), note, pp. 223, 224.

if no trustee be named, or none accept, or the trustee named is dead, or for any reason there is a vacancy in the office of trustee, but the trust is otherwise complete, equity will appoint a trustee and enforce the trust.[33] But, as has been seen, if the trust is a charitable trust and no trustee is named and the charitable purpose is only an indefinite, general one, equity will not enforce the trust in this country, and in England only by the use of the prerogative *cy pres* power.

59. **Appointment of the trustee.**—In so far as the appointment of trustees at the time of the creation of the trust relationship is concerned, the methods of appointment have been described in the chapter on the creation of trusts. It has been seen that, subject to the provisions of the Statute of Frauds and Statute of Wills, they may be appointed by any spoken or written expression of the creator of the trust, just as express trusts may be created in that way. It has also been seen that implied trustees are appointed or created by courts of equity. Thus the primary appointment of the trustee has been discussed. But there may be what might be called a secondary or substitutional appointment. The trustee named in the original trust instrument may die, or refuse to perform the trust duties, or resign after part performance, or be removed for incompetency or other cause. In such case there is necessity for the appointment of a new trustee. This appointment may have been provided for in the original trust instrument. The settlor may legally provide that he

[33] Adams v. Adams, 21 Wall. 185 (U. S.); In re Estate of Petranek, 79 Iowa 410, LEADING ILLUSTRATIVE CASES.

himself shall have the power to appoint the trustee in case of vacancy, or he may provide that a third person, neither settlor nor one of the trustees, shall have the power to fill vacancies in the trusteeship, or he may give to the surviving trustee or trustees the power of appointing the new trustee. If the original settlor does not provide for the filling of vacancies in any such way, a court of equity will make the appointment, selecting a person having no interest opposed to that of the beneficiary. So far as possible, persons laboring under a deficiency or bias, as infants, non-residents, persons financially irresponsible and persons already beneficiaries of the trust, will be avoided in filling the vacancy.[34]

60. **Acceptance or refusal by trustee.**—It has been seen that the acceptance or refusal of the trustee is immaterial, so far as the creation of the trust is concerned. The settlor may be bound and the property rendered trust property, even though the particular trustee named declines to accept the trust. Equity will fill his place. But the acceptance of the trust is necessary to fasten the trust duties upon a particular person. No man can be compelled to become a trustee. However, there is a presumption that a trustee accepts, and, when one is appointed a trustee and no evidence of acceptance or refusal of the trust appears, the trust will be considered accepted. Mere lapse of time is sufficient to create an acceptance, in the absence of any positive evidence of refusal or disclaimer.[35] Acceptance may take place by written

[34] Reigart v. Ross, 63 Wis. 449.

[35] Barclay v. Goodloe, 83 Ky. 493; Roberts v. Moseley, 64 Mo. 507.

statement, by joining in the execution of the trust instrument or by mere oral indication of assent. Acceptance may also be shown by acts aside from words. If the trustee take unqualified delivery of the trust instrument, or take possession of the trust property, or collect the income therefrom, or do any other act inconsistent with a denial of the trusteeship, the acceptance will be sufficiently shown. Where a trust is imposed upon an executor, the securing of the probate of the will is considered an acceptance of the duties of both executor and trustee. Because of the presumption in favor of acceptance, a disclaimer or refusal of a trust should be made promptly. Otherwise, acts may be done by the beneficiary or third parties which will estop the trustee from refusing. The disclaimer need not be under seal or even in writing. Any statement or act clearly showing an intent to refuse the duties of the trust is sufficient. A disclaimer by a trustee operates retroactively so that the situation is the same as if the disclaiming trustee had never been mentioned in the trust instrument. He is not a trustee from the time of his appointment until he disclaims, but his disclaimer relates back to the date of the creation of the trust and prevents it from having any effect as to the disclaiming trustee.[36]

61. **The trustee's bond.**—The settlor of a trust may expressly require the trustee to give a bond for the faithful performance of his duties. In such case the trustee cannot qualify without giving a proper bond. If the settlor makes no mention of a

[36] Goss v. Singleton, 2 Head 67 (Tenn.).

bond in the trust instrument, equity will require one from the trustee only when good cause is shown, such as that the trustee is wasting or threatens to waste the trust funds.[37] If the settlor expressly states in the trust instrument that the trustee shall not be required to give bond, it has been held that no bond may be required by the court under the circumstances.[38] But another court has intimated that a bond may be required, even in the face of this express exemption, if there "is a reason to apprehend that the safety of the fund requires it."[39] State statutes sometimes provide for the requirement of a bond, even if there be an exemption from the giving of one in the trust instrument, when the court thinks it proper.[40] The statutes of the various states frequently require that the trustee give bond.[41] Especially is this true in the case of trusts created by will. When the same person acts as executor and trustee, the giving of a bond as executor will not furnish security for the faithful performance of the duties as trustee. Where no bond has been given and one may properly be required, application should be made to the court of equity, or, in the case of a testamentary trust, frequently to the probate court, by a party interested, such as a beneficiary of the trust. The court will then, in a proper case, order the trustee to give a bond which will be subject to the

[37] Berry v. Williamson, 11 B. Mon. 245, 271 (Ky.).
[38] Ex Parte Kilgore, 120 Ind. 94.
[39] Ladd v. Ladd, 125 Ala. 135.
[40] Foss v. Sowles, 62 Vt. 221.
[41] McClernan v. McClernan, 73 Md. 283; Lackland v. Davenport, 84 Va. 638.

approval of the court as to its amount and the sufficiency of the sureties. Failure to give security when so ordered by the court does not defeat the trust, but constitutes sufficient ground for removal of the trustee.

62. **The powers of a trustee classified.**—A trustee has certain powers expressly given to him by the creator of the trust and others given to him by implication of law, without any express statement of them in the trust instrument. The former are also called special powers and the latter general powers. Express or special powers are divided into two general classes, namely, powers in trust or imperative powers, and naked or discretionary powers. Powers in trust must be exercised by the trustee, while discretionary powers, as their name indicates, may be exercised or not, as the will of the trustee dictates. If not exercised by the trustee, discretionary powers lapse and fail, while powers in trust will be exercised by the court if the trustee fails to carry them out. Whether a power expressly given to a trustee to rent real property, for example, is discretionary or imperative is a matter of construction. The intent of the creator will be ascertained from the trust instrument and surrounding circumstances and will then be followed.[42]

63. **The general or implied powers of a trustee.**—Equity implies such powers in favor of trustees as are reasonably necessary and incidental to the discharge of the duties given them by the trust instrument. What powers are so necessary and incidental

[42] 28 Amer. & Eng. Encyc. of Law (2d ed.), pp. 981-985.

is a question to be determined by the court in each case. The trustee has no implied power to make admissions binding upon the beneficiary.[43] He has implied power to waive formal matters; to have made such repairs to the trust property as are reasonably necessary and to pay for them out of the income of the trust property,[44] and even out of the principal, according to some recent decisions;[45] to insure the trust property and pay water rates and taxes upon it;[46] but he has no implied power to bind the trust estate by an executory contract, nor to compromise a claim owing to the trust estate.[47] But if the trustee compromises a claim in favor of the trust estate and the compromise would have been approved by a court of equity if application had been made to it, the court will allow or ratify the unauthorized act.[48] The trustee's implied powers do not include a power to make improvements of an extensive nature upon the trust property,[49] nor to borrow money upon the credit of the trust estate, without the consent of the court, except for short periods and in emergencies.[50] It is frequently said of the trustee that he has implied power to do what the court would order.[51] There is no implied power to sell, mortgage or lease the trust property, unless the terms of the trust clearly indi-

[43] Calwell's Ex'r v. Prindle's Adm'r, 19 W. Va. 604.
[44] Berry v. Stigall, 125 Mo. App. 264.
[45] 2 Perry, Trusts (6th ed.), pp. 784, 785.
[46] Bridge v. Bridge, 146 Mass. 373.
[47] Caldwell v. Brown, 66 Md. 293.
[48] Bacot v. Heyward, 5 S. C. 441.
[49] McKinley v. Irvine, 13 Ala. 681, 705.
[50] Warren v. Pazolt, 203 Mass. 328, 349.
[51] 28 Amer. & Eng. Encyc. of Law (2d ed.), pp. 982, 983.

cate that the settlor must have intended a sale, mortgage or lease. Thus, if the settlor create a trust in real property and direct the trustee to manage it and to deliver the net income to A during his life, a power to lease the real property would be implied. No express mention of it would be necessary. A power to mortgage is not implied from an express power to sell the trust property.[52] There is a general or implied power to sue upon causes of action accruing to the trust estate during the existence of the trust.

64. **The more common express powers of a trustee.**—A trustee is very commonly authorized by the trust instrument to sell the trust property for some purpose, as, for example, to pay the debts of the settlor or to pay legacies. The time and manner of conducting the sale and the terms to be accepted may be expressly stated by the settlor. If that be so, they should be implicitly followed. The power of sale may also be expressly conferred upon the trustee by an order of a court. This will be done only in cases where the needs of the beneficiary require the sale or some advantage to the trust estate can be gained by a sale.[53] To make such an order for sale it is, of course, necessary that the court have jurisdiction of the trust property and that all persons interested in the trust be made parties to the proceeding. A sale by order of court should be confirmed by the court to insure its validity. If no method of sale is prescribed by court order or trust instrument, the trustee should use his discretion as to the time, place and manner

[52] Willis v. Smith, 66 Tex. 31.
[53] Alemany v. Wensinger, 40 Cal. 288.

of sale. Any fair sale, either private or public, will be satisfactory. The consent of the beneficiaries is not necessary to make the sale valid where the trustee has a power of sale, but the consent of the beneficiary or of any other person may be made by the settlor a condition precedent to the exercise of the power. The terms of the sale may be such as the trustee determines in the exercise of a fair discretion, unless they are fixed by the settlor or the court. The sale may be either upon credit or for cash. The power to sell does not include the power to exchange. Hence, the property received as consideration for the sale must be money or a promise to pay money.[54]

A sale made by a trustee in pursuance of a power expressly given is presumed to have been validly made. The burden is upon the party attacking its validity to show cause.[55] A sale under a trustee's power which is tainted with fraud on the part of the buyer may be set aside by the beneficiary on application to a court of equity. As seen in the sections on constructive trusts, if the trustee himself directly or indirectly becomes the buyer at the sale of the trust property, the sale is voidable at the option of the beneficiary. Because of the official character of the seller, there is no implied warranty of the title of personal property sold at a trustee's sale. There is, of course, no implied warranty of the title of real property so sold. The buyer takes exactly what the trustee had by way of title and nothing more. The

[54] Ringgold v. Ringgold, 1 Har. & G. 11 (Md.).
[55] Gardner's Appeal, 81 Conn. 171.

deed or bill of sale should be executed by the trustee as trustee and not merely in his individual capacity.

Another common power expressly given to the trustee is that to mortgage the trust property. It may be conferred by direction of the settlor or by order of court, if a showing of necessity or advantage to the trust estate from a mortgage is made. Although the mortgage is not authorized, if the beneficiary consent to it, the mortgage will be binding upon the trust estate. The mortgage, if made, should be for a purpose authorized by the trust instrument or order of the court and should be executed by the trustee as trustee. The power to lease property is frequently given to the trustee by the settlor or by order of court. It is subject largely to the rules mentioned above with respect to sales and mortgages. The power of investment of the trust funds is one often given expressly to the trustee. The proper conduct of the trustee in making investments will be considered later herein under the head of the duties of the trustee.[56] Settlors frequently give to their trustees the power of filling vacancies in the trusteeship or of appointing their successors.

65. **Powers of joint trustees.**—If there are two or more trustees, they are considered as one person. They hold the trust property by joint tenancy and are a unit in the eye of the law. For that reason joint trustees must join in every act with relation to the trust which requires the use of any discretion. If the trust property is to be leased, the whole number of the trustees must join in the lease. A major-

[56] See § 70, post.

ity of them cannot bind the others.[57] Of course, the trust instrument may expressly authorize a majority of the trustees to act for all and then such action will be proper. But the general rule is that all must unite in every act. There is an exception, however, in the case of public trusts. Thus, where five commissioners were appointed to assess the depreciation of property in a town due to the removal of the county seat, it was held that three of them might act and bind the others.[58] And in ministerial acts, such as the receipt of money due upon a mortgage, or other acts requiring no discretion, one trustee may act for all.[59] A few courts have expressed the opinion that, in cases of great emergency, one trustee may act in matters of discretion for all.[60] One trustee's act on behalf of all, even though unauthorized, may become valid by a subsequent ratification of it by the other trustees. Since trustees hold as joint tenants, upon the death of one, unless the trust powers were in some way made personal by the settlor, the survivors become vested with all the trust powers and they may exercise them without the acquiescence of the representatives of the deceased trustee. And so, with a similar qualification as to purely personal powers, if one of several trustees disclaims the trust and refuses to act, those who accept it may exercise all the powers of the trust, although they do not constitute all the trustees named by the settlor.

[57] Golder v. Bressler, 105 Ill. 419, 434.
[58] Beall v. State, 9 Ga. 367.
[59] Bowes v. Seeger, 8 W. & S. 222 (Pa.).
[60] Busse v. Schenck, 12 Daly 12 (N. Y.), Vandever's Appeal, 8 W. & S. 405 (Pa.).

66. **Delegation of trust power.**—In the performance of his ordinary duties a trustee is in a peculiarly confidential relationship. His own prudence and skill are relied upon by the settlor. Hence, he is required to exercise personally all the trust powers in which any discretion is involved. He will not be allowed to appoint an agent or attorney to exercise such powers as that of selling the trust property.[61] It has been stated, however, that even such discretionary duties may be delegated if all parties interested consent.[62] And if an agent of the trustee performs a discretionary act, it will become binding if the trustee ratifies and approves it by subsequent conduct.[63]

In one case where the trustee was incapacitated to perform arduous duties, the court appointed an agent to exercise the active duties of the trust for him.[64] But the expediency of this seems doubtful. The trustee should be removed and a new one appointed in such a case. If the trustee delegate his discretionary powers, he will become personally liable for any injury to the trust estate. The trustee may, however, delegate to others powers which are merely ministerial, that is, which require no discretion. For example, a trustee may employ another to post notices and carry on the details of a public sale, when the trust places upon him the duty of selling property to pay debts, although he could not delegate the power to decide when and how the sale

[61] Mason v. Wait, 4 Scam. 127 (Ill.).
[62] Seely v. Hills, 49 Wis. 473.
[63] Newton v. Bronson, 13 N. Y. 594.
[64] Franklin v. Franklin, 2 Swan 521 (Tenn.).

should be made.[65] The trustee must exercise the power of sale as to all matters of discretion, but may entrust to an agent the matters of mere routine requiring no judgment.

[65] Johns v. Sergeant, 45 Miss. 332.

CHAPTER VIII.

THE TRUSTEE—HIS DUTIES, RIGHTS, LIABILITIES AND REMOVAL.

67. **The Trustee's Duties—(a) To execute the trust.**—It goes almost without saying that the trustee owes to the beneficiary the duty of prudently and skillfully carrying out the trust as it is stated in the trust instrument. Thus, if A devise property to B in trust to collect the rents and profits thereof and pay them to C during his life, it is obviously the most elementary duty of B to procure such rents and profits and, after deducting the necessary expenses, pay them to C. Such duties might be called the express duties of the trustee. There are, however, certain duties which the trustee owes the beneficiary equally, but which are not usually fully expressed in the trust instrument. Some of these duties are of a negative character, that is, to refrain from doing certain acts, and others are of an affirmative character, that is, to perform certain acts. These various duties will now be considered.

68. **Same subject—(b) Negative duties.**—The trustee owes to the beneficiary the duty not to delegate to agents or servants the performance of the discretionary duties of the trust. The trustee was presumably appointed because of some peculiar trustworthiness or ability, and to these qualities the

should then use reasonable care in the keeping of the property. He should, first of all, keep it separately from his own property and for any losses due to mixture he may be held liable.[70] It is not necessary that he retain the entire trust property in his own actual possession. He may leave it in safety deposit boxes or in the care of agents or attorneys when the nature of the property and the needs of the trust so require. Thus, it will be more often the duty of a trustee to retain in his own possession negotiable paper and other easily transferrable property, than to keep actually in his own house non-negotiable property which is needed at another place frequently.[71]

70. **Same subject—(d) The investment of the trust funds.**—Where any considerable amount of money remains long in the trustee's hands it is his duty to invest it and obtain a profit for the beneficiary. The time within which he should make this investment depends upon the amount of money which he has and the opportunity for investment. If he delays unduly long and the beneficiary thereby loses, the trustee will be held liable for interest upon the sum in his hands.[72] The trust fund may be invested at the time it comes into the possession of the trustee. It may consist of stocks and bonds rather than of money. It is ordinarily not the duty of the trustee to change investments of trust moneys. But there will be such a duty if the fund is laid out in

[70] Wagner v. Coen, 41 W. Va. 351.
[71] Field v. Field, L. R. 1894, 1 Ch. 425 (Eng.).
[72] Siechrist v. Bose, 87 Md. 284.

investments which a prudent man ought to know are unsafe. If the trustee, after a reasonable time, does not change obviously unsafe investments, and a loss results to the trust estate as a consequence, the trustee will be personally liable therefor.[73]

Again, the settlor may direct that the trust moneys be invested in certain securities. In this case it is the duty of the trustee to follow such directions implicitly, regardless of his own judgment. He will be liable for any loss suffered if he fails to follow the directions of the settlor. The degree of care which the trustee is bound to exercise in making trust investments is described by one court as follows: "The trustee is bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own like affairs."[74] The trustee, in seeking a proper investment, should not select property owned by himself privately, or in which he is interested. Such an investment would place the trust estate liable to loss through the conflict of private and representative interest. Nor should the trustee use his own funds in combination with trust funds to make an investment. The trust investment should be separate.[75]

The trust investment should be in the name of the trustee as trustee. If made in the name of the trustee privately, the beneficiary may hold the trustee liable for any loss suffered through the investment,

[73] Ward v. Kitchen, 30 N. J. Eq. 31.
[74] King v. Talbot, 40 N. Y. 76, 85, 86.
[75] McCullough v. McCullough, 44 N. J. Eq. 313.

even though it were made with due care and diligence. In general, the trustee should follow the rule of investing only within the jurisdiction where the trust is to be administered, but in exceptional cases he may buy property located in a foreign state.[76]

The bonds of the United States or of any of the states are generally regarded as proper for trust investments. First mortgages on real estate, if a reasonable margin of security is allowed, are good trust investments. A safe margin upon farm property exists when the loan is up to two-thirds of the value of the property. In loans upon city property the amount should not exceed one-half the value of the property.[77] Second mortgages on real estate are not allowed as trust investments. The purchase of real estate outright is regarded unfavorably as a trust investment, because of its aptitude to be unproductive, fluctuating in value, and difficult to dispose of. Hence, except in unusual circumstances, it is improper for a trustee to invest trust funds in land.[78] Personal securities, that is, unsecured notes and bonds of private persons and corporations, are not allowable trust investments, even though the maker be solvent and financially responsible. They are too uncertain. The maker may die or suffer reverses.[79] The stock of a manufacturing or trading corporation is, as a general rule, a poor form of investment for trustees, since it is apt to be unproductive. But in some American states stock investments have been

[76] Matter of Denton v. Sanford, 103 N. Y. 607.
[77] In re Salmon, 42 Ch. Div. 351 (Eng.).
[78] Williams v. Williams, 35 N. J. Eq. 100.
[79] Vreeland v. Vreeland's Adm'r, 16 N. J. Eq. 512.

allowed when discretely made.[80] It is obvious that the investment of trust funds in business or speculation is improper. The rights of the beneficiary cannot lawfully be laid open to such risk.[81]

The trustee may deposit trust moneys for a short time in a bank, but he is not expected to leave them there longer than a time reasonably sufficient to find a good investment for them. Hence, when he allows them to remain thus idle for too long a time, as for fourteen months, the trustee will be liable for the amount of the deposit when the bank fails.[82] And if he deposit the money in his own name he will also be liable for its loss.[83] If the securities in which the trustee invests depreciate, without fault on his part, he is not liable for the loss.

In a number of states there is statutory control of the investments of trust funds.[84] The effect of these statutes is generally to enlarge the field of investment open to trustees and to allow the purchase of federal or state bonds, real estate securities, and approved municipal and railroad bonds. The acquiescence of the beneficiary in the investment of trust funds in an improper security may relieve the trustee from liability for loss thereby.[85]

If the trustee makes any gains on improper investments, he will hold such gains for the beneficiary, or, at the beneficiary's option, the beneficiary

[80] In re Dickinson's appeal, 152 Mass. 184.

[81] Warren v. Union Bank, 157 N. Y. 259.

[82] Cann v. Cann, 33 Weekly Rep. 40 (Eng.).

[83] In re Arguello's Estate, 97 Cal. 196, LEADING ILLUSTRATIVE CASES.

[84] See 39 Cyc. 394, 395, and Ames, Cases on Trusts (2d ed.), note, p. 486, for references to the statutes of the various states.

[85] Matter of Hall, 164 N. Y. 196.

may claim the amount of the original trust fund with interest. The interest allowed to the beneficiary in case of failure to invest or improper investment is usually simple interest at the legal rate. The effect of a breach of the trustee's duty with respect to investments will be considered more fully hereafter,[86] but in general it is to make the trustee personally liable to the beneficiary for the amount of the principal of the investment, with interest thereon.

71. **Same subject—(e) Possession and control of the trust property.**—Wherever the trust is active, that is, the trustee has duties to perform, it is obvious that the trustee must have possession of the trust property. Hence it is the general rule that the beneficiary of an active trust is not entitled to demand of the trustee possession of the trust property.[87] But if the trust is passive the beneficiary is then entitled to actual possession.

Even though the trust is active, the English cases and several cases in this country, allow the beneficiary to demand of the trustee a conveyance of the trust property. The theory of these cases is that the beneficiary is practically the owner of the trust property and the trust is solely for his benefit. Therefore he ought to be allowed to have the legal estate transferred as he likes. Upon this theory it has been held that where a testator gave to a trustee stocks to be delivered to a beneficiary at twenty-five, the beneficiary was entitled to a transfer of the stocks at twenty-one. He was absolute owner and the only

[86] See §§ 79, 84.

[87] Tidd v. Lester, 5 Maddock 429 (Eng.); Davis v. Hunter, 23 Ga. 172.

person interested. The intent of the testator was not respected.[88] And this duty of the trustee to convey on the beneficiary's demand has been asserted in some American cases.[89] But other American courts have held that, if the trust is active, even though all the beneficiaries join in a demand for a conveyance to them or their nominees, it is not the duty of the trustee to make any conveyance except according to the terms of the trust.[90] The beneficiaries cannot destroy the trust. In one state the matter is now regulated partially by statute.[91]

72. **Same subject—(f) To give information and account.**—The trust exists solely for the benefit of the cestui que trust and he has a right to know in what the trust funds are invested, how much of principal and income the trustee has on hand, what are the expenses of administration, and all such matters of business connected with the trust. It is the duty of the trustee to keep records which will enable the administration of the trust to be traced and to display such records to the beneficiary at his request. And so the trustee should allow the beneficiary to inspect all documents in his possession connected with the trust estate, such as deeds, contracts, and legal opinions.[92]

Trustees are under a duty to render accounts of their proceedings to the beneficiary when such accounts are necessary or useful to the beneficiary.

[88] Saunders v. Vautier, 4 Beav. 115 (Eng.).
[89] Huber v. Donoghue, 49 N. J. Eq. 125.
[90] Clafin v. Clafin, 149 Mass. 19; Cuthbert v. Chauvet. 136 N. Y. 326.
[91] New York Personal Property Law, § 23.
[92] In re Tillott, L. R. (1892), 1 Ch. 86 (Eng.).

Whether such accounts are necessary and useful is decided by the court upon the facts of each individual case. It depends upon the condition of the trust. If the trustee has committed a breach of trust and the trust property is in danger, an account will be more readily ordered than if the trustee has been faithful and no emergency has arisen.[93] Often the state statutes provide that trustees shall render accounts at annual or other regular intervals.

The account may be demanded at a proper time by anyone having a legal interest in the administration of the trust. Within this class are included beneficiaries and their creditors, representatives of deceased beneficiaries and remaindermen, entitled to the property after the end of the trust. The account may be demanded, not only against the trustee, but against his representatives in case of his death, or against his successor. The account may be obtained generally in a court of equity, although in some states the probate courts have concurrent jurisdiction with courts of equity over trusts created by will.[94] The accounting may be voluntary, that is, at the request of the trustee, or involuntary, that is, upon the motion of the beneficiary or other interested party.

Upon this accounting the trustee should be charged with all the property which he has received, both originally upon the acceptance of the trust and as income and profit from such original property. The trustee will also be held liable for property which he would have received, had he been diligent in per-

[93] Wilson v. Kent, 38 Colo. 492.

[94] For example see 39 Cyc., pp. 470, 471.

forming his duties. For example, if he received as a part of the original trust property a promissory note which he could have collected by prompt action, but, at the time of the accounting, the note is uncollected and uncollectible, the trustee will be charged with the amount of the note.[95] And so, too, the trustee must be held liable for property lost through his neglect, though once in his possession. If he mingle the trust funds with his own, or use the trust funds for private purposes, or commit any other breach of trust, and a loss results, the trustee must account for the lost property, even though he has been careful and prudent in other respects. The trustee will be liable for all interest and other income actually received and also for such interest and income as he would have received, had he been reasonably diligent. Thus, if trust money has been idle, due to his neglect to invest, the trustee may be charged with interest on it upon the accounting.[96]

The trustee is entitled to be credited in his account with all expenditures which he has actually and necessarily made. Under such head will come the expenses of the employment of necessary clerks, stenographers, and attorneys, the sums paid out for the repair of the trust property, tax, and insurance bills, payments made to the beneficiaries and advances made to the trust estate out of the trustee's own pocket.[97] These disbursements should be proved by vouchers and not merely by the testimony of the

[95] Hunt v. Gontrum, 80 Md. 64.

[96] Mathewson v. Davis, 191 Ill. 391.

[97] Marks v. Semple, 111 Ala. 637; Ingham v. Lindemann, 37 Oh. St. 218.

trustee. The trustee may be freed from the burden of accounting if the beneficiary has, when of full age and sound mind, released the trustee. But such a transaction must be attended with the utmost good faith on the part of the trustee and will be closely scrutinized by equity.

73. **The trustee's rights.**—The two principal rights of the trustee are his rights to reimbursement for expenditures made for the trust and his right to compensation for his services. If the trustee expend from his own funds any sum for the payment of valid debts of the trust estate, or for necessary repairs to the trust property, or for the employment of necessary aid in the administration of the trust, or similar legitimate trust expenses, he is entitled to have such amount repaid to him out of the trust funds. And for the repayment of this money he has an equitable lien on the trust property, that is, he can hold the trust property as security for the repayment of his advances and if they are not repaid may sell the trust property to secure such repayment.[98]

The English rule is that the trustee is not entitled to compensation for his services, but the general American rule is contra. In this country quite commonly courts of equity fix the compensation of trustees and exercise a wide discretion in so doing. The compensation of the trustee may be provided for in the trust instrument or by contract between the settlor and the trustee. In that case, by the acceptance of the trust, the trustee will become bound to be satisfied by the amount there specified. Or the

[98] King v. Cushman, 41 Ill. 31.

compensation of the trustee may be fixed by statute. This is the case in a number of American states.[99] However, if there is no such arrangement for compensation, the court of equity fixes the amount of recompense to be given the trustee.[1] Even though the compensation is fixed by statute, equity will regulate the award within the statutory amount, according to the merits of the case. It may award less than the statutory limit.[2]

In fixing the compensation equity considers the diligence and fidelity with which the trustee has performed his duty, the amount of time spent by him on the labors of the trust, the amount of property, and consequently of responsibility involved, the condition of the property at the time and the effect of the services of the trustee upon that value. The amount awarded to the trustee for his work is usually called his commission. It is generally fixed on a percentage basis, reckoning upon the amount of trust property received and disbursed by the trustee.[3]

The commissions of the trustee are usually paid to him at the time of his accounting. The trustee may waive his right to compensation expressly or by acts showing that he does not intend to insist upon it. He may also forfeit his compensation for fraud or intentional breach of trust.[4] But one com-

[99] 39 Cyc. 482.

[1] Premier Steel Co. v. Yandes, 139 Ind. 307; Maginn v. Green, 67 Mo. App. 616.

[2] Gibson's Case, 1 Bland 138 (Md.).

[3] In re Estate of Gloyd, 93 Iowa 303.

[4] Newton v. Rebenack, 90 Mo. App. 650.

mission is allowed to joint trustees. It must be apportioned between them according to the value of their services.[5] The commission of the trustee is payable out of the income of the trust under ordinary conditions, but if the income be insufficient, the principal may be charged.[6] In this country, as distinguished from England, a trustee is entitled to compensation for professional services, such as those of an attorney, rendered to the trust estate, in addition to his commissions.[7]

74. **The trustee's liabilities—(a) For his own acts or omissions.**—The trustee's liabilities are of three classes, namely, those arising from negligence, misconduct and contract. If the trustee is guilty of such carelessness with respect to the management of the trust property that he is not acting as an ordinarily careful and prudent man would act in the same circumstances, then he will be liable personally for any loss resulting from such carelessness. Of course, if the trustee commits a positive breach of trust, that is, does an affirmative act in contravention of the trust, he will be similarly liable. These two forms of liability are generally to the beneficiary. A third sort may exist in favor of third persons by virtue of an express or implied agreement made by the trustee.

Because of the general rule exempting the trustee from liability to the beneficiary for his acts as long as he uses ordinary care and refrains from positive wrongs, it is law that, if the trust property depre-

[5] Matter of Johnson, 170 N. Y. 139.
[6] Biddle's Appeal, 83 Pa. St. 340.
[7] Perkins' Appeal, 108 Pa. St. 314.

ciate in value without carelessness or wrongdoing by the trustee, the loss will fall on the beneficiary. And so, also, if the trust property is stolen from the trustee or his agent without his fault, the trustee is absolved from all liability. Destruction by fire which is caused by no negligence or misdeed of the trustee likewise relieves him from responsibility to the beneficiary for the trust property.[8] Thus, if he has done his best and exercised ordinary prudence, a mistake or error of judgment in buying property for the trust estate or in selling the trust property will not cause the trustee to incur any liability to the beneficiary. The trustee is not expected to be infallible, nor to insure the safety of the trust property.[9]

The negligence which will render the trustee liable for damages suffered by the trust estate may occur in a great variety of ways. Only a few typical cases can be mentioned. The trustee's duty to collect the assets of the trust estate has been previously mentioned.[10] If he has an option as to the form in which the trust fund shall be delivered to him and he negligently chooses to take it in improper securities, he will be liable for the loss resulting. And so, too, if, after obtaining the trust property, he carelessly fails to collect such part of it as consists of claims against others, the trustee must suffer.[11]

The trustee's duty with respect to investments has been discussed.[12] He is not liable for a loss to the

[8] Cromie v. Bull, 81 Ky. 646.
[9] Harkness v. Scammon, 48 Mo. App. 136.
[10] See § 69.
[11] Waterman v. Alden, 144 Ill. 90.
[12] See § 70.

trust estate caused by the failure of his investments to prove sound or profitable, unless he has manifested some lack of care or some misconduct with respect to them.

Thus, if he has taken a first mortgage on real estate with ample margin of security, but property in that neighborhood has decreased in value, due to circumstances which could not be foreseen, the trustee is not responsible for the shrinkage. But if he places trust moneys in stocks, a form of investment not generally allowed by equity, then, no matter what his intention or how good his judgment, he must stand the loss, if there is any. If the bank in which the trustee has placed trust funds fail, and he used reasonably good judgment in placing the money there, he will not be responsible, unless the deposit was in his own name privately, and then only when the bank had no knowledge of the fiduciary character of the fund.[13]

So, too, if the trustee carelessly perform his duty to keep accounts, or to have the trust property repaired, or to pay taxes upon it, or carelessly pay the trust funds to persons not entitled to them as beneficiaries, he will be liable.[14] The negligence of the trustee or his agent in managing the trust property may also render the trustee liable to persons other than the beneficiary. For example, a careless failure to keep the trust property in repair which causes physical injuries to a person properly upon the prem-

[13] Crane, Boylston & Co. v. Moses, 13 S. C. 561; Parsley's Adm'r. v. Martin, 77 Va. 376.

[14] Thiebaud v. Tait, 138 Ind. 238.

ises, gives rise to a cause of action against the trustee personally.[15]

If negligence makes the trustee liable, of course intentional misconduct will so result. Wilful breaches of trust are of various kinds. They range from a conversion of the trust funds to the use of the trustee to the mere doing of acts not authorized by the trust instrument. If the trustee knowingly does an act which contravenes the purposes of the trust, or is a breach of his duty to the beneficiary in any way, he is liable for the damage resulting to the trust estate.[16]

It is obvious that the trustee's negligence or misconduct may be excused and his liability therefore prevented, if the beneficiary consent to the performance of the acts in question. But this consent must be given freely and openly, while the beneficiary is of full age and of sound mind. It will be scrutinized carefully by the court.[17]

The damage actually done to the trust estate is naturally the measure of the trustee's liability in these cases of negligence or misconduct. For instance, if the fund has been wholly lost, the trustee must replace it; but, if it is merely placed in a poor investment, the difference between the amount invested and the present value of the investment will measure the damage, unless the beneficiary exercises the option which he has to avoid the whole investment and hold the trustee liable for the amount originally invested.

[15] O'Malley v. Gerth, 67 N. J. L. 610.
[16] Hart's Estate, 203 Pa. St. 488.
[17] Dyer v. Riley, 51 N. J. Eq. 124.

"The general rule is well settled in this state that executors and trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon the contract or obligation of the testator."[18] Trustees are not allowed conclusively to bind their beneficiaries by executory contracts, but are expected to assume a personal liability for the property or services furnished and then to receive permission to charge the trust estate upon the accounting, when the beneficiary will be present and have an opportunity to object to the expenditure. But if the trustee is insolvent or absent from the state and the trust estate has received the benefit of the contract, the trust estate may be held directly for the debt.[19] But the trustee may stipulate that he shall not be individually liable, if he can obtain the consent of the other party to such a contract.

75. **The trustee's liabilities—(b) For the acts and omissions of his co-trustees and agents.**—The general American rule is that a trustee is liable only for his own neglect or misconduct, unless he co-operates with or connives at wrongdoing on the part of his co-trustee.[20] Mere passivity will not render the trustee liable for the wrongdoing of the co-trustee. "If he is merely passive and simply does not obstruct the collection by his associate, he is not liable for the latter's

[18] O'Brien v. Jackson, 167 N. Y. 31, 33.
[19] Norton v. Phelps, 54 Miss. 467.
[20] Stowe v. Bowen, 99 Mass. 194.

waste, if guilty of no negligence himself. But where one executor or trustee receives the funds of the estate and either delivers them over to his associate or does any act by which the funds come under the sole possession and control of the latter, and but for which he would not have received them, the executor or trustee is liable for the loss which is sustained in consequence of such action."[21] Failure to interfere in a known breach of the trust and permitting a wrongdoing co-trustee to take the entire management of the property have been held to make the trustee liable.[22]

If trustees are jointly liable for negligence or wrongdoing and recovery is had against one for the whole amount of damages, he may sue the co-trustee and obtain from him the share which he should have paid. The trustee who has paid has a right of contribution.[23] Unless a trustee is negligent in the selection or retention of agents, or delegates to them discretionary duties, he is not liable for their negligence or misconduct.[24]

76. **The removal of the trustee.**—The trustee may be relieved from his duties on his own application. He may resign. If he acts without compensation, he is entitled to resign at any time and the court of equity must relieve him of his duties, no matter what reason he gives for his resignation.[25] But if the office

[21] Bruen v. Gillet, 115 N. Y. 10, 14-15.

[22] Smith v. Pettigrew, 34 N. J. Eq. 216; Royall's Adm'r v. McKenzie, 25 Ala. 363.

[23] Sherman v. Parish, 53 N. Y. 483, 489.

[24] Anderson v. Roberts, 147 Mo. 486.

[25] Bogle v. Bogle, 3 Allen 158 (Mass.).

is one of profit to the trustee and he has once accepted it, he cannot be freed from the duties of the position whenever he desires. He must present his resignation to the court with a statement of sufficient cause for the resignation, or with proof that all interested parties consent to it.[26] If the interests of the trustee and beneficiary are hostile, or they are incapable of getting along with each other, or the trustee is incapacitated from doing his work because of illness, or some other good reason appears, the court will accept the resignation. But the trustee cannot shake off the trust at will. The proceeding for the acceptance of the resignation is in a court of equity. Costs will be awarded against the trustee, unless the reason for the resignation is particularly meritorious.[27]

In addition to a voluntary removal or resignation, there may be an involuntary removal of the trustee. The right to make this removal may be vested by the settlor of the trust in anyone. It always exists, regardless of the provisions of the trust instrument, in a court of equity, and in some states to a certain extent in courts of probate.[28] The removal of the trustee is highly in the discretion of the court of equity. No definite rules can be laid down as to when the removal will be decreed and when not. Equity will not remove except for some serious reason. Mere bad judgment or a single instance of incompetence will not be enough. But the removal has been made for such causes as incapacity of the trustee, due to

[26] Diefendorf v. Spraker, 10 N. Y. 246.

[27] Richmond v. Arnold, 68 Atl. 427 (R. I.).

[28] Chambers v. Mauldin, 4 Ala. 477; for references to statutes see 39 Cyc. 266.

old age, ill health, drunkenness or insanity; insolvency or bankruptcy of the trustee; removal to a foreign jurisdiction; a breach of the trust through fraud or dishonesty; hostility and discord between the trustee and beneficiary; disobedience to the orders of the court.[29]

The trustee may also, of course, be removed by his death. If the deceased trustee was one of several, the title to the trust property and the trust duties pass to the surviving trustees because trustees hold as joint tenants.[30] If the deceased trustee was originally the sole trustee or had become such by the death of his co-trustees, at common law the title to the trust property vests in the heirs at law or next of kin of the deceased trustee, dependent upon the nature of the trust property, whether real or personal.[31] By statute in a number of states, such as New York, Wisconsin, Indiana and Kansas, the trust now vests in the court having general equity jurisdiction upon the death of a sole trustee.[32]

[29] Gartside v. Gartside, 113 Mo. 348; Quackenboss v. Southwick, 41 N. Y. 117; See note, Ames, Cases on Trusts (2d ed.), p. 223.

[30] Reichert v. Mo. & Ill. Coal Co., 231 Ill. 238.

[31] Woodruff v. Woodruff, 44 N. J. Eq. 349.

[32] Royce v. Adams, 123 N. Y. 402; Reigart v. Ross, 63 Wis. 449; 1 Perry, Trusts (6th ed.), § 341.

CHAPTER IX.

THE BENEFICIARY—HIS CAPACITY, ACCEPTANCE, RIGHTS AND LIABILITIES.

77. **Who may be a beneficiary.**—The word "object" is sometimes used in a technical sense as equivalent to beneficiary or cestui que trust. Generally speaking the capacity to take and hold property determines the capacity to be the beneficiary of a trust. Any natural or artificial person capable of owning property can be a cestui que trust. Thus, the crown in England or a state or the federal government in America may be the beneficiary of a trust.[33] The capacity of corporations to be beneficiaries depends on the corporate powers granted by the legislature. Aliens were under a disability at common law with respect to the holding of real property, and it was therefore held that they could not be the beneficiaries of trusts of real property.[34] But they might hold personal property, and a trust of real property to be sold and converted into money for their benefit was sustained under the doctrine of equitable conversion. It is now law in a great majority of American states that aliens have rights equal to those of citizens with respect to the holding of real and personal property. Hence they may generally be beneficiaries of trusts without restriction.

[33] Neilson v. Lagow, 12 How. 98 (U. S.).
[34] Leggett v. Dubois, 5 Paige's Ch. 114 (N. Y.).

Trusts for married women, infants and incompetents are, of course, valid. They can take and hold property, although restricted now or formerly in their capacity to contract with reference to it. Indeed, in some American jurisdictions trusts are valid only for minors, incompetents and spendthrifts.[35]

"It may be laid down as a general proposition that it is not necessary, in order to create a trust estate, that a cestui que trust should be named who is in being. * * * A trust may be valid and effectual, where a trustee is named, although the cestui que trust may not then be *in esse,* provided such cestui que trust came into being."[36] Thus, a trust for the children of A now in being or to be born is valid. Afterborn children will be let in as beneficiaries.[37] The settlor may himself be a beneficiary, subject to the claims of creditors. The trustee may, with other persons, be a beneficiary, but cannot be sole trustee and sole beneficiary because of the doctrine of merger of the legal and equitable estates.

It is a fundamental rule that the beneficiary of a private trust must be a definite, ascertained or ascertainable person. Thus, a gift to A in trust for such objects of benevolence and liberality as A shall approve of is void because of the indefiniteness of the beneficiaries.[38] The trust is not charitable because others than objects of charity may be admitted to its

[35] Georgia Code, § 3729; Gray v. Obear, 54 Ga. 231.

[36] 2 Washburn, Real Property (3d ed.), pp. 173, 198, cited in Salem, etc., Mills Co. v. Stayton, etc., Co., 33 Fed. 146, 153.

[37] Haxtun v. Corse, 2 Barb. Ch. 506 (N. Y.).

[38] Morice v. Bishop of Durham, 10 Vesey 522 (Eng.), LEADING ILLUSTRATIVE CASES.

benefits, and as a private trust it cannot stand for lack of known beneficiaries to enforce it.[39] To this requirement of definiteness charitable or public trusts form a great exception. It is their distinguishing feature that their beneficiaries are indefinite persons.

A private trust for an unincorporated association is valid, not as a trust for the association which is not a legal entity, but as a trust for the members of the association at the time of the creation of the trust.[40] Even though the trust be for indefinite members of a class, as for the Roman Catholic incorporated institutions of New York City to be selected by the trustees, yet, if there is a power of selection in the trustees, the trust may stand as a private trust, since the beneficiaries are ascertainable, although not ascertained.[41]

Trusts for the care of animals are allowed in a few cases, although the beneficiaries obviously have no capacity to enforce the trust.[42] But generally in this country, in the absence of statute, trusts for the erection or repair of monuments are not allowed as private trusts. If the monument is to be for the testator, provision for it may be allowed as a part of the funeral expense. If it is to be erected for a public man, it may be allowed as a charitable trust.[43] But as a private trust it is indefensible because of the

[39] For articles on this case and the general subject of definiteness of beneficiaries, see 5 Harvard Law Review 389, and 15 Harvard Law Review 67.

[40] Austin v. Shaw, 10 Allen 552 (Mass.); Hart v. Seymour, 147 Ill. 598.

[41] Power v. Cassidy, 79 N. Y. 602.

[42] In re Dean, 41 Ch. Div. 552 (Eng.).

[43] Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9.

lack of a beneficiary with capacity to enforce the trust. Trusts for the saying of masses are generally enforcible as public or charitable trusts, but not as private trusts. As trusts of the latter kind they fail because of the absence of a beneficiary with capacity to enforce them.[44]

78. **Acceptance or refusal of the trust by the beneficiary.**—A trust cannot be forced upon a beneficiary. He must, in order that a valid trust may exist, at some time indicate his consent to become the beneficiary of the trust.[45] This acceptance need not, however, be made at the time the trust is created. The beneficiary need have no knowledge of the trust at that time. It is sufficient if he later consent to it. The acceptance need not be by an express statement from the beneficiary. It may be implied from his acts in taking the benefits of the trust or in recognizing the trustee. If the trust is wholly beneficial an acceptance of it by the beneficiary will be presumed.[46] But if there are attached to the trust any conditions onerous to the beneficiary, his acceptance of the trust will not be presumed and must be expressly proved.[47]

79. **The beneficiary's rights and obligations.**—The most obvious right of the beneficiary is that the trust, as declared and defined in the trust instrument, be carried out by the trustee. If the trustee holds the legal title to land for the purpose of paying to the beneficiary the net income thereof during his life,

[44] In re Schouler, 134 Mass. 426.
[45] Cunniff v. McDonnell, 196 Mass. 7.
[46] Furman & Co. v. Fisher, 4 Coldw. 626 (Tenn.).
[47] Kemp & Buckey v. Porter, 7 Ala. 138.

it is the most fundamental right of the beneficiary to have the trustee collect the income, pay the expenses of the trust and deliver the net income to him. As a natural incident of this right is the right of the beneficiary to have the trustee refrain from all breaches of trust, such as a conveyance of the property to a third person without authority, or the use of the trust funds for the benefit of the trustee. The beneficiary also has a right to know whether his interests are being properly protected by the trustee and what the value and state of the trust property are. This right to knowledge about the trust estate entitles the beneficiary to demand an inspection of all documents and books connected with the trust administration and that the trustee keep and present upon proper occasions accurate accounts of his dealings as trustee.[48]

The beneficiary's rights do not usually include the right to the actual use and enjoyment of the trust property. The very creation of the trust ordinarily indicates that another than the beneficiary is to manage and control the property, but that the beneficiary is to derive some benefit therefrom. Hence if land be given to A in trust to pay to B the net income during B's life, B is not entitled to go upon the land and cultivate it and possess it.[49] He must be content with accepting from A the net profits which A is able to make from the land by renting it or using it himself. The terms of the trust may, however, be such that, although the trust is active and the trustee

[48] Green v. Brooks, 81 Cal. 328.
[49] Wickham v. Berry, 55 Pa. St. 70.

has duties, it is the expressed intent of the settlor to allow the beneficiary to use the trust res himself. But if the trust is passive merely, then the rights of the beneficiary do include possession. Thus a gift of land to A in trust for B, with no mention of any duties on A's part, would create a passive trust and entitle B to enjoy the land by actual occupation.

It is the prevailing rule that it is one of the rights of the beneficiary to call on the trustee for a conveyance of the trust property, either to the beneficiary or to a stranger. Thus, if land be left to A in trust, to hold for ten years and pay the net income to X, Y and Z, and at the end of that period sell it and pay the proceeds to X, Y and Z, the latter as beneficiaries may call upon A before the ten years have elapsed to end the trust by a conveyance to them or to a purchaser of the property from them, according to some American cases,[50] but not according to the view existing in Massachusetts and New York.[51] The prevailing rule is based on the principle that the sole beneficiaries are the only persons interested in the trust property and ought to be allowed to dispose of it as they wish. They lack nothing except the legal title to make their ownership complete.

The beneficiary has the right of alienating or encumbering his interest. In the absence of statutory prohibition or direction by the settlor the beneficiary may sell his right to the present or future benefits of the trust or may mortgage or otherwise encumber

[50] Huber v. Donoghue, 49 N. J. Eq. 125.
[51] Claflin v. Claflin, 149 Mass. 19.

such right. This right of alienation is removed by statute in the case of certain trusts in a few states.[52] And in the majority of states this right of alienation may be done away with by the settlor, through the insertion of a clause expressing such intent.[53] It is self-evident that the beneficiary has a right to have third persons refrain from injuring the trust estate. Thus, if a stranger is trespassing upon the trust property and taking its profits, the beneficiary is injured and in a way hereafter described may have his remedy.

The trust property may consist wholly or in part of choses in action in favor of the settlor, such as promissory notes. Who is entitled to receive payment of and discharge such obligations? It is generally not a right of the beneficiary to discharge obligations owned by the trust estate, but is the right of the trustee. Therefore, in an action by the trustee against the obligor, a discharge by the beneficiary is no defense.[54] But in some cases, where the beneficiary has had the whole beneficial interest and the trust was practically passive, the beneficiary has been allowed to discharge the obligation.[55]

If the trust property consist of stock of a corporation, it is not one of the rights of the beneficiary to vote upon that stock, but is rather the right of the trustee by virtue of his legal title.[56] But if the

[52] 2 Perry, Trusts (6th ed.), § 827a.

[53] Broadway Nat. Bk. v. Adams, 133 Mass. 170, LEADING ILLUSTRATIVE CASES. See § 50.

[54] Gibson v. Winter, 2 L. J. (N. S.) 130 (Eng.).

[55] McBride v. Wright, 46 Mich. 265.

[56] Matter of Barker, 6 Wend. 509 (N. Y.).

trustee threatened to vote the stock so as to cause irreparable injury to the beneficiary, equity would prevent such voting by an injunction.[57]

The beneficiary's liabilities because of the trust are negligible. He is not bound by the contracts of the trustee with respect to the trust property, nor is he liable for the trustee's torts committed in the administration. The burdens of the trust fall upon the trustee, who is entitled to reimbursement for the charges which he incurs which are proper trust expenditures. Thus, the taxes upon the trust property are assessed against the trustee and with reference to his place of residence.[58]

[57] McHenry v. Jewett, 90 N. Y. 58.
[58] People ex rel. Kellogg v. Wells, 182 N. Y. 314.

CHAPTER X.

THE BENEFICIARY—HIS REMEDIES.

80. **The beneficiary's remedies—(a) Are in equity.**—With a few exceptions, to be mentioned hereafter, the beneficiary of a trust has no standing in a court of law. The trust is the creation of the court of equity. It was created by it to give a remedy in cases where none existed at law. Upon the legal side of the court the legal title of the trustee must prevail. Thus, if A settle a trust upon B to hold land for the benefit of A, and B wrongfully convey the land to X and receive certain moneys therefor, A cannot sue B in a court of law as for money had and received, but must bring a bill in equity against B for the breach of the trust.[59] While the distinctions between courts of equity and those of law are now in many jurisdictions less sharply drawn than formerly, it is important still to bear in mind that the beneficiary's rights are enforced on the equity side of the court.

An exception to the rule confining the beneficiary to courts of equity exists in cases of trusts which have been so far performed that there is due to the beneficiary from the trustee a definite sum of money. "It is well settled that a cestui que trust cannot bring an action at law against a trustee to recover for money had and received while the trust is still open;

[59] Norton v. Ray, 139 Mass. 230, LEADING ILLUSTRATIVE CASES.

but when the trust has been closed and settled, the amount due the cestui que trust established and made certain, and nothing remains to be done but to pay over money, such action may be maintained."[60] Thus, in the case last cited, the trustee had rendered a final account showing a definite balance due to the beneficiary and the latter was therefore allowed to maintain an action at law for that sum.

The beneficiary's rights are so distinctly equitable that, when sued in a court of law, the beneficiary could not set up his interest in the trust property, because of the rule that equitable defenses were not interposable in courts of law. But this rule is now largely done away with by statutes allowing equitable defenses to be set up in legal actions.[61] The beneficiary may not maintain an action of tort against the trustee for damages for breach of the trust. He must proceed in equity. But, of course, in many situations which may give rise to implied trusts the beneficiary has legal actions open to him. Thus, if A's chattels are stolen by B and sold for money, A may establish a constructive trust in equity as to the proceeds or sue at law. Or, if A's land is fraudulently procured to be conveyed to B and B converts the land into money, A may maintain an action to establish a constructive trust, or may sue B at law for money had and received, or may maintain an action of tort at law for damages for the injury done him by the deceit. In these cases of implied trusts the beneficiary has his choice of legal or equitable remedies.

[60] Johnson v. Johnson, 120 Mass. 465, 466.
[61] Cavalli v. Allen, 57 N. Y. 508.

If he takes the former, there is no trust. It is only in cases of express trusts that the exclusive equitable jurisdiction exists.

81. **Same subject—(b) Are against the trustee.**—Strictly speaking the beneficiary is not the owner of the trust property, but is the owner of a claim against the trust. The beneficiary is often said to be the beneficial owner of the trust property or the owner of the equitable title to the trust property. But this is the use of language loosely and is only an approximate statement of the beneficiary's situation. There can be only one absolute owner of property. That is the trustee. The beneficiary owns other property of an intangible kind, namely, a claim against the trustee to have the terms of the trust carried out.[62]

That this statement of the beneficiary's position is true is shown by an examination of the remedies open to him. His right to have the trust enforced is adjudged by a court of equity in a suit against the trustee. The court in which the action is brought will have jurisdiction if the summons is served upon the trustee with due legal formality. It is unnecessary that the trust property should be within the state in which the action is brought. Thus, the trust property may be land located in Maine. The usual rule is that actions relating to land must be brought in the state in which the land lies. But if a court of Massachusetts can get jurisdiction of the person of the trustee by the proper service of summons, it can and will enforce the trust. Its decree will be that

[62] See article by J. B. Ames, 1 Harvard Law Review 9.

the trustee do or refrain from doing certain acts. It will be a decree in personam. It will not be that the land be sold or that anything else be done with it. It will not be a decree in rem.[63] And so, too, even though the land which is the subject-matter of the trust be within the state of Illinois, the courts of that state will have no jurisdiction over a suit to enforce the trust, unless they obtain jurisdiction over the trustee by service upon him, either personally or by statutory service by publication or substitution. The trustee is the important element in the beneficiary's suit. His claim is not against the trust property.[64] If both trustee and trust property be outside the jurisdiction of the court of equity in which the suit is brought, the court will have no jurisdiction to give relief to the beneficiary.[65]

The nature of the beneficiary's right is further shown by the rules with respect to actions by or against strangers with respect to the trust property. If the beneficiary really owned the trust property, it would be natural that he be allowed to maintain an action for injury to it or to recover it. But the general rule, irrespective of statute, is that the trustee alone can maintain such an action. He owns the property and, if it is injured or wrongfully withheld by a stranger, he may and ought to obtain relief for such injury or detention. But the beneficiary must seek his relief through the trustee against whom his rights exist.[66] In many states, however, there are

[63] Gardner v. Ogden, 22 N. Y. 327.
[64] Felch v. Hooper, 119 Mass. 52, LEADING ILLUSTRATIVE CASES.
[65] Henry v. Doctor, 9 Oh. 49.
[66] Bailey v. N. E. Mut. L. Ins. Co., 114 Mass. 177.

statutes providing that the real party in interest must sue. These statutes except trustees of express trusts, and have been construed as permissive only so that either the trustee or the beneficiary would seem to be entitled to maintain an action with regard to the trust property under such statutes.[67]

There is a general exception to the rule requiring the trustee to bring all actions with respect to the trust property. If the trustee refuse to bring such action, the beneficiary may begin it himself, making the trustee a co-defendant with the stranger.[68]

It has been stated by good authority that "in suits in equity in relation to the estate by or against strangers, both the trustee and the cestui que trust must be parties. * * *"[69] But it is submitted that the exception to this rule, namely, that the beneficiary need not be made a party to a suit by or against the trustee, unless the beneficiary's interest is not adequately represented by the trustee, is of equal importance. Thus, generally in bills to recover the trust property from a stranger, bills to foreclose mortgages held by the trust estate, bills to redeem trust property under foreclosure sales, bills for specific performance of contracts to buy from or sell to the trust estate, bills to restrain encroachments on the trust property, or actions to obtain damages for injuries to the trust property, the trustee is deemed to represent the beneficiary sufficiently to allow the maintenance of the action without the

[67] New York Code of Civ. Pro., § 449; Potter v. Potter, 8 Civ. Pro. R. 150 (N. Y.).

[68] Anderson v. Daley, 38 N. Y. App. Div. 505.

[69] 2 Perry, Trusts (6th ed.), § 873.

joinder of the beneficiary.[70] And so in suits by a stranger to defeat the trust, the beneficiaries are not necessary parties unless there is some conflict of interest between the beneficiaries and the trustee or some other reason for making it advantageous to the beneficiary to have the opportunity for appearing in court and acting personally. As long as the powers and duties of the trustee are broad enough to enable him fully and fairly to represent the beneficiary, he may do so.[71]

82. **Same subject—(c) May compel the performance or non-performance of an act.**—If the trustee fails to perform the trust, the beneficiary may apply to equity for an order compelling the trustee to do the acts which he has been failing to perform. Thus, when the trust calls for a conveyance of lands to the beneficiary and the trustee fails to do so, he will be ordered to deed the lands to the beneficiary and account for the rents and profits thereof.[72] As previously noted,[73] it is one of the duties of the trustee to give to the beneficiary information regarding the trust and an account of his acts as trustee. The performance of this duty will be enforced by court order upon application of the beneficiary. Similarly, the court will enjoin the performance of acts which are not in performance of the trust and which are detrimental to the trust estate. Thus, if the title to the trust property be in dispute, so that its full value

[70] 2 Perry, Trusts (6th ed.), § 873; Ames, Cases on Trusts (2d ed.), note, p. 261; Carey v. Brown, 92 U. S. 171, LEADING ILLUSTRATIVE CASES.

[71] Kerrison v. Stewart, 93 U. S. 155.

[72] Crawford v. Ginn, 35 Iowa 543.

[73] See § 72, ante.

could not be obtained upon a sale of it, the trustee will be restrained from selling it.[74] Or the trustee may be restrained from removing the trust property beyond the jurisdiction of the court which is administering the trust.[75]

83. **Same subject—(d) May obtain change of control of trust property.**—If the rights of the beneficiary are being violated because of the negligence, incompetence or dishonesty of the trustee, he may apply to equity for a change in the control of the trust property. This will be brought about through the removal of the trustee and the appointment of a new trustee who will have the same duties as the original trustee, or through the placing of the trust property in the hands of an officer of the court called a receiver. The grounds upon which a trustee will be removed and a new one appointed have been previously considered in this article.[76] A receiver will be appointed by equity for the trust property with reluctance and only in case of danger of loss to the trust property.[77]

84. **Same subject—(e) May hold the trustee personally liable.**—If the trustee violate the rights of the beneficiary by neglect or misconduct, the beneficiary may hold the trustee liable in money for the damage caused. The beneficiary may elect to pursue this remedy, though the remedy later to be discussed of following the trust funds is open to him. Thus, if the trustee deposit trust moneys in a bank in

[74] Faulkner v. Davis, 18 Gratt. 651 (Va.).
[75] Symons v. Reid, 58 N. C. 327.
[76] See § 76, ante.
[77] Poythress v. Poythress, 16 Ga. 406.

his own name and the bank fail, the beneficiary may recover of the trustee the amount of the deposit.[78] It was a breach of trust so to deposit the moneys. Or if the trustee convert the trust property to his own use, the beneficiary may hold him liable for its value.[79]

85. **Same subject—(f) May follow the trust property.**—"Trust property or property substituted for it may be recovered from the trustee and all persons having notice of the trust. So long as the fund can be distinctly traced, the chancellor will follow it and fasten the purpose of the trust upon it, unless the rights of innocent third parties have intervened."[80] The remedies of the beneficiary so far discussed have been personal in their nature, namely, to compel the trustee to do or not to do certain acts, to remove the trustee from control, or to subject the trustee to a money liability. The remedy now to be discussed is impersonal, against the trust property or its substitute. The right of the beneficiary to have the trust property or its substitute, wherever found, subjected to the purposes of the trust, is collateral to the right to hold the trustee personally liable. Thus, if A is trustee of $1,000 for B, and A wrongfully uses the money to buy land from X, the title to which he takes in the name of A, B has several options. B may hold A responsible for the $1,000 and compel him to replace it, with interest. B may follow the $1,000 into the hands of X, if he can trace it, and

[78] Naltner v. Dolan, 108 Ind. 500.
[79] Peabody v. Tarbell, 2 Cush. 226 (Mass.).
[80] 2 Perry, Trusts (6th ed.), § 828.

if X knew of the breach of trust, and may subject that money to the purposes of the trust. B may follow the trust funds into the land which is now in A's name, and may impress a trust upon it. Or B may obtain a lien upon the land in A's name for the $1,000, foreclose that lien and hold A personally liable for the balance of the $1,000, if the land does not sell for that much.[81]

In the situation just given, there are four options, namely, to hold the trustee liable for the whole amount of the property misapplied, to retake the trust property, to follow the trust property into its substitute, or to obtain a lien on the substituted property and hold the trustee for any deficiency.

If the trust property has been misapplied by the trustee and is still in his hands, it is easy to understand how the beneficiary can retake it. Thus, if A, as trustee for B, take $1,000 of trust moneys and place them in a safety deposit box of his own, intending to appropriate them to his own use, it is obvious that B may retake the particular funds thus deposited and have them declared trust property. But more difficult questions arise when the trust property has disappeared but its substitute or proceeds are left, or where the trust fund or its substitute is mixed with private funds of the trustee. Such problems often arise upon the bankruptcy of the trustee. If the beneficiary is to have the right of following the trust funds into the bankrupt trustee's estate, he will be entitled to obtain the whole amount of the

[81] J. B. Ames, Following Misappropriated Property Into Its Product, 19 Harvard Law Review 511.

trust fund, but if he cannot follow the trust funds into such estate, he must be content to take his dividend with the general creditors.

The question of following trust funds into the assets of the trustee is essentially one of identification. The property to be taken by the beneficary must be identified as the original trust property or as its substitute. Regarding the degree of identification necessary to allow such pursuit of the trust fund, the courts differ. Some have held that the burden is on the beneficiary to show that the proceeds of the trust property have come into some specific fund or property of the trustee, and not merely into the general assets of the trustee.[82] Other courts are satisfied if the beneficiary can show that the trust property or its proceeds has entered into the general assets of the trustee and has remained there.[83] While still other courts have held that the beneficiary may follow the trust property into the assets of the trustee, if he can show that the trust property or its proceeds entered the trustee's general assets and went to benefit his estate, whether it remains there or not.[84]

Thus, if A, as trustee for B, misapplied $1,000 of trust funds, and then became bankrupt, the courts of the first class would require B, in order to entitle him to take $1,000 of the assets of A, to show that the original $1,000 was now represented by some specific fund of money or some specific piece of property

[82] Lowe v. Jones, 192 Mass. 94, LEADING ILLUSTRATIVE CASES.
[83] Cavin v. Gleason, 105 N. Y. 256, LEADING ILLUSTRATIVE CASES.
[84] Jones v. Chesebrough, 105 Iowa 303.

LAW OF QUASI-CONTRACTS

BY

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CHAPTER I.

NATURE AND EXTENT OF QUASI-CONTRACTUAL OBLIGATIONS.

1. **Quasi-contract defined.**—The name "quasi-contract" is borrowed from the Roman law. It is gradually displacing the term "contract implied in law," which is often used to express the same thing. In its broadest sense a quasi-contract may be defined as a non-contractual obligation that is treated by the common law, for the purpose of affording a remedy for its breach, as if (quasi) it were a true contract. Thus defined it includes obligations arising from four widely different sources: (1) a court record, as, for example, a judgment for damages; (2) a duty recognized by the common law as attaching to an office, as the duty of a sheriff to pay the proceeds of an execution sale to the judgment creditor; (3) a statute imposing a duty upon one person to pay

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money to another under certain conditions, as a statute imposing a duty upon the master of a vessel to pay pilotage fees to the pilot first tendering his services; (4) the receipt of a benefit by one person from another, the retention of which without compensation would constitute what the law calls an "unjust enrichment," as, for example, money paid under a mistake of fact.[1] These obligations occupy a field somewhere between contract and tort. To understand their nature they must be distinguished from the duty to perform a contract and the duty not to commit a tort.

2. **Quasi-contract compared with true contract—Points of resemblance.**—The non-contractual character of quasi-contractual obligations has not always been recognized. They have been treated in many books as if they were true contracts. Indeed, the pioneer treatise on quasi-contracts as a distinct branch of the law was published as late as 1893.[2] This is owing, first, to a superficial resemblance and, secondly, to the narrow limitations of common law procedure. There are two points of resemblance. The more important is that each of these obligations, contractual and quasi-contractual, always rests upon some particular person in favor of some other particular person; each of them is personal rather than universal in its character. Thus, if A has contracted to sell B a horse, the duty to sell rests upon A alone and the right to have this duty performed is vested in B alone. In like manner if A has received money

[1] Woodward, Quasi-Contracts, § 1.

[2] Keener, Quasi-Contracts.

from B under a mistake of fact the quasi-contractual obligation to make restitution rests upon A alone and the right to have restitution is vested in B alone.

The second point of resemblance is in the affirmative character of the two obligations. A contractual obligation is usually, and a quasi-contractual obligation is always, an obligation to do something. A man more often contracts to act than to refrain from acting; his contract is generally an undertaking to pay money, to do work or to transfer property. As for quasi-contract, it is normally an obligation to pay money; it is never an obligation to refrain. These points of resemblance, though seemingly of no practical consequence, have in fact been of considerable importance, as will appear in § 5.

3. **Quasi-contract distinguished from true contract.**—Notwithstanding these points of resemblance nothing can be clearer than that none of the four sources of quasi-contractual obligation enumerated in § 1 is in any true sense contractual. It is common knowledge that agreement is at the basis of all true contracts. This agreement may be expressed in words and give rise to what is called an express contract; or it may be inferred from the acts or conduct of the parties and give rise to what is called a contract implied in fact; but in either case there is a real agreement, an actual meeting of the minds of the parties. Not so with quasi-contracts, the so-called contracts implied in law. The unpaid judgment of a court may indeed be the foundation of a common law action for breach of contract; but a judgment derives its binding effect from the action of the court

and not from the agreement of the litigants. And so with the sheriff's failure to pay over the proceeds of an execution sale; this will enable the judgment creditor to maintain a contract action against him, but it is very clear that his duty to pay did not arise from an agreement to pay,—it was imposed by the law as an official duty. So, too, with statutory duties; the master must pay the pilot's fees whether he has agreed to do so or not, for the statute says that he must. Again, if, in making change, A pays B $10 too much and B refuses to pay it back, A may have restitution through a contract action; yet B's duty to make restitution springs not from agreement but from the "unjust enrichment" that would result were he permitted to profit from the mistake. In all of these cases the obligation is imposed regardless of the presence or absence of an agreement. It cannot then be contractual.

4. **Quasi-contractual obligation as distinguished from the duty not to commit a tort.**—The obligation of quasi-contract and the duty not to commit a tort are alike in one respect: they are each imposed by the law without regard to the will of the parties. In other respects, however, they are very unlike. The former is, as we have seen, an obligation to do something, ordinarily to pay money. The latter is normally a duty to refrain from doing something, a duty not to inflict harm. Furthermore, a quasi-contractual obligation, as has been shown in § 2, is always imposed upon a particular person in favor of a particular person; whereas the duty not to commit a tort rests upon every man in favor of every other

man. Nobody may strike anybody, or libel him, or trespass upon his land, or carry off his goods. In short, the duty to refrain from committing a tort and the corresponding right to be free from a tort are both universal in character. For these reasons quasi-contract and tort cannot be brought within the same field.

5. **Effect of procedure on scope of quasi-contracts.** —Thus it appears that all quasi-contractual obligations, arising as they do from court records, official and statutory duties, and from the operation of the principle that no one ought to be allowed to enrich himself unjustly at the expense of another, are alike in that they cannot be brought within the field of either contract or tort. They are also alike in that they are obligations imposed by law upon particular persons in favor of particular persons. But do these abstract and apparently accidental considerations warrant us in classifying them together under a separate head and making them co-ordinate with the obligations of contract and tort? And if we are justified in doing that, why call them quasi-contracts rather than quasi-torts, or why not call them by another name that will distinguish them sharply from both tort and contract?

The answer is to be found in the limitations of common law procedure. The rigidity of that system is familiar to every student of history. A reference to the article on Pleadings in Civil Actions in this work will show that the common law actions to enforce obligations were divided into two great classes, actions *ex contractu* (out of contract) and actions

ex delicto (out of tort).[3] These actions were of ancient origin and they were established at a time when the limits of contract and tort had not been defined; indeed their classification into these two groups is comparatively modern. There being no other actions for the enforcement of obligations, it is plain that the obligations which we are now considering must have been enforced by one or the other of these two classes of actions if at all.

Within the contract group we find the actions of debt and general assumpsit. If an obligation were for the payment of a sum certain, as in case of a judgment record, debt would lie; in other cases the points of resemblance between contract and quasi-contract, already noted in § 2, appear to have made it natural to adopt the action of general assumpsit. It was easy for an age familiar with the expedient of legal fictions in surmounting procedural difficulties to refer A's obligation to pay money to B to a fictitious promise made by A to B, since a duty to pay money often arose through an actual promise and when it did so arise could be enforced in an action of assumpsit. It is then the accepted classification of the ancient common law actions, obviously a procedural accident, that accounts for the wide scope of obligations comprehended by the name quasi-contract when used in the broad sense in which it has been defined in § 1 and in which it is generally employed.

6. **Scope of this article—Confined to quasi-contracts arising from receipt of benefits.**—It needs no

[3] See subject, PLEADINGS IN CIVIL ACTIONS.

argument to show that the procedural accident that has brought together obligations arising from such widely different sources as the record of a court, an official duty, a statute, and the receipt of a benefit, in a classification based upon the form of action employed to enforce them, does not necessitate their treatment together farther than to show just how it is that they have been thus brought together and why it is that they are called quasi-contracts. Most of them are, in fact, usually treated in connection with other subjects and are relatively unimportant; only the last of them, the obligation to pay for benefits received, demands special treatment as a distinct subject; it demands such treatment both because of its relative importance and of its distinctive character. This article will therefore be limited to quasi-contracts arising from this source. In a general way our problem will be to discover the circumstances under which the law will impose an obligation to pay for a benefit.

7. **Origin and scope of quasi-contracts arising from receipt of benefits—Moses v. Macferlan.**—The other sources of obligation already considered, viz., court record, official duty and statute, were recognized and enforced by the law from very early times, although their classification as quasi-contracts is modern; but this source of obligation, the receipt of a benefit, was unknown to the early law. Indeed it was only by the adoption of an equitable principle unknown to the law, the principle that no one ought to be allowed to enrich himself unjustly at the expense of another, that a recovery was first allowed in

this class of cases. The adoption of this equitable principle seems to have been made by the Court of King's Bench in the leading case of Moses v. Macferlan[4] in 1760, under the influence of Lord Mansfield, whose opinion in that case is the fountain head of our modern law of quasi-contracts.

The facts in that case were briefly as follows: One Jacob had executed certain promissory notes in favor of the plaintiff Moses. In order to accommodate Macferlan by enabling him to raise money upon them, Moses endorsed these notes to Macferlan under the latter's promise never to proceed against the plaintiff upon them. Macferlan broke his promise, sued Moses in an inferior court, and recovered judgment upon the notes. Moses paid the judgment and brought an action in the form of indebitatus assumpsit in the King's Bench to get the money back. Now this form of action proceeded upon the allegation of a promise made in consideration of an existing debt. It had already been decided that the plaintiff, in order to maintain such an action, need not prove the making of an actual promise, but that it would be enough for him to prove the existence of a debt, leaving it to the law to supply the promise through the expedient of a legal fiction.[5] However, prior to Moses v. Macferlan the debt proved in support of this action had always been a debt arising under the operation of purely legal principles. In this case there was clearly no such debt; indeed the only possible ground of recovery was that it would be inequitable

[4] 2 Burr. 1005 (Eng.).
[5] Slade's Case, 4 Coke, 92b. (Eng.).

under the circumstances to permit Macferlan to retain the money paid by Moses in discharge of the judgment. The real question therefore was whether a debt sufficient for the purposes of the action of indebitatus assumpsit might arise from the operation of purely equitable principles. The court unanimously answered the question in the affirmative. Lord Mansfield, in delivering the opinion of the court, thus stated the nature and scope of the obligation to pay for benefits:

"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('*quasi ex contractu,*' as the Roman law expresses it). * * * This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono* (according to what is just and good), the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered by him by any course of law—as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail;

or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

"In one word, the gist of the action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

8. **Essentials to recovery for benefits—"Unjust enrichment."**—From the use of such expressions as "obliged by the ties of natural justice and equity" it must not be inferred that the right of recovery in a particular case is a problem of moral philosophy. Recovery does not depend upon the trial judge's idea of justice in the particular case nor yet upon the jury's notion of what is right between man and man. Here as elsewhere the courts must be guided by principles and rules fairly capable of uniform administration. These must be sought in the reports of the decided cases. From the cases one learns that this branch of the law is in reality complex but that it is built upon the equitable maxim that "no one ought to be made rich out of another's loss."

Too much attention to the words, as opposed to the spirit of this maxim, appears to have led both courts and writers to specify "enrichment" of the defendant as an essential to the plaintiff's recovery; but a recent writer has shown that an actual enrichment, in the sense of an increase of his estate, is quite unnecessary, it being enough, so far as this element is concerned, that the defendant has received from

the plaintiff something that he requested or desired.[6] It is obvious that if A has worked for B at the latter's request his right to compensation ought not, in the absence of contract, to depend upon whether the work done made B a wealthier man. And yet it is not enough that the defendant shall have obtained from the plaintiff something that he desired; the circumstances under which he obtained it must be such that it would be inequitable for him to retain the benefit without compensating the plaintiff. With the problem of determining what are such circumstances the modern law of quasi-contracts is chiefly concerned. To that problem will be devoted the remainder of this article.

[6] Woodward, Quasi-Contracts, § 8.

CHAPTER II.

RECOVERY FOR BENEFITS TORTIOUSLY OBTAINED BY DEFENDANT—WAIVER OF TORT.

9. **In general.**—Every tort gives rise to an action for damages in which the plaintiff may recover compensation for whatever actual damage he may have sustained by reason of the defendant's tort. The damage inflicted upon the plaintiff may or may not have been accompanied by a benefit to the defendant. If the defendant has injured the plaintiff's person or imprisoned him or destroyed his property or damaged it, one can see only damage to the plaintiff as a consequence of the defendant's tort. If, however, the defendant has tortiously obtained the plaintiff's services or taken or used his property, we can see, along with damage to the plaintiff, a distinct benefit to the defendant. Will such a benefit give rise to a quasi-contractual obligation? On principle it would seem that it should, unless for reasons of policy the law refuses to recognize that the same act may be the basis of liability in both tort and quasi-contract; for it is obvious that if there is any case in which the "ties of natural justice and equity" require that a man should pay for a benefit that he has received, his own wrongful appropriation of the benefit must be such a case.

It would clearly be unjust to permit a double recovery for the same thing, once on the ground that

its loss had damaged the plaintiff and once on the ground that its appropriation had benefited the defendant; but there seems no sound policy against permitting the plaintiff to elect between the two grounds of liability as the basis of an action against the defendant. The law has, however, been slow to admit the existence of the two grounds of liability in this class of cases. Some courts have indeed admitted the principle very freely; others have admitted it to a very limited extent and in a special class of cases. Wherever the election is allowed, it is generally said that the plaintiff may "waive the tort and sue in assumpsit." As Professor Keener has shown, this is an inaccurate expression, for there is no more a waiver of tort when the plaintiff sues in assumpsit than there is a waiver of the quasi-contract right when he sues in tort; in either case there is simply an election between two forms of action.[7]

10. **Necessity of benefit to defendant.**—If the basis of recovery is really quasi-contractual in these so-called cases of waiver of tort it is clear that in every case in which the contract form of action may be used there must be an actual benefit to the defendant as a result of the transaction.

The necessity of showing such a benefit when this form of action is used is well brought out in a California case.[8] The plaintiff had entered into a contract with the defendant railway company in which he agreed to pay to the company the sum of

[7] Keener, Quasi-Contracts, p. 159.

[8] Minor v. Baldridge, 123 Cal. 187, LEADING ILLUSTRATIVE CASES.

$1,000 as soon as the company should have obtained a terminal upon Humboldt Bay. Thereafter the defendant Baldridge, acting in behalf of the defendant company, fraudulently represented to the plaintiff that the terminal had been secured. Relying upon this representation the plaintiff paid the stipulated sum to the defendant company, which thereby adopted and profited from the fraud. Now it is clear that had the plaintiff so desired he might have sued both defendants in an action for damages based upon their joint tort and recovered judgment against both of them. Instead, however, he sued them in a contract action for money had and received. At the close of the plaintiff's evidence each of the defendants moved for a nonsuit. Upon the denial of his motion each defendant excepted and assigned the ruling as error on appeal.

With reference to the railway company the court held that the ruling was proper, since it had actually obtained the plaintiff's money upon a false representation. But as to Baldridge the court held that the motion should have been granted. Said Temple, J., in delivering the opinion of the court: "There was no evidence which even tended to prove that Baldridge ever received the money, or any portion thereof. If the action were for damages the rule would be different, as both principal and agent are responsible for a tort committed by an agent within his authority and adopted by the principal. But the basis of the action is, that the defendant has money which in equity and good conscience he ought to pay to plaintiff. There was no evidence showing, or

tending to show, that Baldridge had any money which he ought to pay to plaintiff."

11. **Same subject—What constitutes sufficient benefit.**—The word benefit is a very broad one; it comprehends both temporal and spiritual things. We should scarcely expect the law to make anything but a temporal benefit, capable of legal valuation in terms of money, the basis of a quasi-contractual obligation; but, granted that the benefit is of such a nature, is there any reason why one form of temporal benefit should take precedence over another in the creation of the obligation? Should the receipt of money, for example, give rise to the obligation any more readily than the receipt of goods or of services? As a matter of pure substantive law it seems impossible to justify any such distinction. If any distinction is taken the explanation must be sought in the law of procedure. From the standpoint of that law no such distinction is necessary.

As already noted, the action of indebitatus assumpsit is ordinarily used for the enforcement of quasi-contracts. Now this action is very elastic and comprehensive; it is broad enough to allow a recovery upon a fictitious promise based upon any state of facts capable of creating a debt or obligation to pay money.[9] However, many courts do make a distinction in favor of benefits in the form of money, especially where waiver of tort is involved. As a rule they find no difficulty in allowing an action of assumpsit where money has been tortiously obtained whether directly from the plaintiff himself or from

[9] Martin, Civil Procedure at Common Law, § 56.

the sale or hiring of his property. The particular variety of the action employed for this purpose is known as the "count for money had and received." This count recites the making of a promise in consideration of a debt arising from the receipt of money to the use of the plaintiff, a particularly obvious fiction when the money has been tortiously obtained. However, a seeming failure to appreciate the full significance of this fiction, together with the accidental circumstance that the early precedents happened to be based upon this count, has led many courts to restrict the plaintiff's right to "waive the tort and sue in assumpsit" to those cases in which this count may be employed; that is to say, they allow the election only where money or its equivalent has been received. Other courts have adopted the more liberal and logical view and, subject to occasional exceptions, are disposed to admit the election in any case in which the tort-feasor has obtained a benefit capable of valuation in terms of money. These differences will more fully appear in considering the subject in relation to specific torts.

12. **Must there be diminution of the plaintiff's estate?**—It has already been seen in § 8 that recovery in quasi-contract is ordinarily based upon the injustice of allowing the defendant to benefit at the expense of the plaintiff. This necessarily involves the proposition that the plaintiff recovers not merely because the defendant has derived a benefit but also because he has derived that benefit from the plaintiff. Consequently, it is generally assumed that the plaintiff will not establish a quasi-contractual right

to the defendant's profits in a particular business transaction by showing that the transaction would have been impossible but for the defendant's tort; for perhaps the plaintiff could not have made such profits in any case and they cannot therefore be said to have been taken from him.[10]

On the other hand, it would seem that an actual loss of tangible property should be unnecessary. A man's quasi-contractual right to payment for his services ought not to be defeated in any case by showing that the rendition of the services did not cause a loss of specific property; it should be enough that he lost his services. So, too, his quasi-contractual right to recover for the use of his horse ought not to be defeated by showing that the horse was worth as much after as before using; it should be enough that he lost the use of the horse. Accordingly it seems clear that McSorley v. Faulkner,[11] in which the plaintiff was allowed a recovery in quasi-contract for the defendant's wrongful use of a telephone of which plaintiff was lessee, was correctly decided; the use which benefited the defendant was obtained from the plaintiff.

Nevertheless there are cases in which the courts have apparently denied a recovery on account of the absence of a diminution of the plaintiff's tangible property. A notable instance is Phillips v. Homfray,[12] in which case recovery in quasi-contract was sought against an executrix for her testator's tor-

[10] Keener, Quasi-Contracts, p. 166; also compare Woodward, Quasi-Contracts, § 274.

[11] 18 N. Y. Supp. 460.

[12] 24 Ch. D. 439 (Eng.).

tious use of certain underground passages in the plaintiff's mine. It was conceded that this had saved the testator expense; but a recovery was denied, the court saying that the testator, "by carrying his coal and ironstone in secret over the plaintiff's roads took nothing from the plaintiff." Upon that ground the case seems insupportable; he took at least the use of the roads and that was something of value. The question as to whether the valuable thing taken is tangible or intangible is logically irrelevant.

13. **Conversion.**—Questions as to the right to "waive the tort and sue in assumpsit" most frequently arise with reference to the tort of conversion. This tort may be briefly defined as the unauthorized dealing with a chattel in such a way as to involve an assertion of ownership. It may be committed in a variety of ways and may occur upon taking possession of the chattel, upon dealing with the chattel while in possession, or upon parting with the possession. Thus A may take B's watch by force, by fraud, or by mistake; or, having obtained possession of the watch lawfully for a special purpose, he may repudiate this possession as by destroying the watch or permanently appropriating it to his own use; or, having obtained possession in some way, he may dispose of it by a sale for cash or on credit or by barter.[18]

Where the conversion consists in the destruction of the chattel it is difficult to see a benefit to the de-

[18] See also subject, TORTS.

fendant in addition to the damage to the plaintiff, and it is not surprising that the courts hold that assumpsit cannot be maintained in such a case.[14] Where, on the other hand, the conversion consists in a sale for cash, the most conservative courts allow the action for money had and received in accordance with the early precedents.[15] Even if the sale be on credit but a chattel be subsequently received by the defendant as and in lieu of money, these courts will strain a point and treat the chattel as money;[16] indeed the receipt of a mere promise to pay money has been deemed sufficient to warrant the action for money had and received.[17]

14. **Same subject—Conversion without sale.**—Where, however, a chattel other than money has been converted but has not been sold by the defendant, as, for example, where it has been bartered or exchanged by him for another chattel,[18] or has been taken or appropriated for his own use and benefit,[19] the more conservative courts, in accordance with their narrow view that the tort may be waived in those cases only in which the action for money had and received is an available remedy, as explained in § 11, consistently deny a recovery.

The less conservative courts, on the other hand, in accordance with their broad view that assumpsit ought to lie upon the fiction of an implied promise in any case in which the defendant's tort has directly

[14] Reynolds v. Padgett, 94 Ga. 347, 21 S. E. 570.

[15] Staat v. Evans, 35 Ill. 455.

[16] Miller v. Miller, 7 Pick. 133 (Mass.).

[17] Burton Lbr. Co. v. Wilder, 108 Ala. 669, 18 So. 552.

[18] Kidney v. Persons, 41 Vt. 386.

[19] Jones v. Hoar, 5 Pick. 285 (Mass.).

caused a temporal benefit to him, generally allow a waiver in all of these cases. And, according to this view, it matters not whether the conversion consists in a taking by force, a taking with the owner's consent procured by fraudulent representations, or by the wrongful appropriation and use of a chattel already in the defendant's possession.[20] Even where the defendant is a purchaser in good faith from a seller who can convey no title, these courts generally allow the action on the ground that the defendant actually obtains the plaintiff's property and that the latter's rights ought not to be affected by the defendant's mistake as to the vendor's title.[21] Some courts, however, hold that it would be inequitable to compel an innocent purchaser to pay twice for a chattel, and therefore restrict the owner's recovery to the value of the chattel less what the defendant has paid to the wrongful vendor.[22]

Of course if the original wrongdoer obtained a title which, though voidable as between himself and his transferor, nevertheless enabled him to convey a good title to an innocent purchaser for value, as in the case of goods obtained by fraud or money obtained by any means, such an innocent purchaser, having obtained a perfectly good title, is not liable in either tort or assumpsit.[23]

15. **Trespass on land—Assumpsit for use and occupation.**—A trespass on land, like a trespass to a

[20] Starr Cash Car Company v. Reinhardt, 20 N. Y. Supp. 872.

[21] Roberts v. Evans, 43 Cal. 380.

[22] Greer v. Newland, 70 Kan. 315, 78 Pac. 835.

[23] Goodwin v. Wertheimer, 99 N. Y. 149; State Bank v. United States Bank, 114 U. S. 401.

chattel, may damage the plaintiff without benefiting the defendant, as, for example, where the defendant floods the plaintiff's crop or burns his house. In such case, of course, there can be no quasi-contractual right of recovery. On the other hand, a trespass on land may involve the severing of that which, when severed, will become a chattel, as, for example, trees, coal, stone, or ore. If, after severance, the chattel remains on the land, there is still no benefit to the defendant and consequently no right to recover for such in the plaintiff. When, however, the severed chattel is carried off by the defendant, the case becomes practically indistinguishable, as regards recovery in quasi-contract, from the ordinary case of conversion of a chattel. Accordingly recovery in assumpsit is allowed to the same extent as in simple conversion.[24] But very often the trespass does not include the severance of a chattel; frequently it consists simply of a use and occupation of the premises. For such a benefit to the defendant it would seem that the plaintiff ought to recover in those jurisdictions which do not restrict the right of waiving the tort to those cases in which money has been received. However, for historical reasons beyond the scope of this article, the courts have generally restricted the plaintiff to his tort action in this class of cases.[25]

16. **Trespass to the person—False imprisonment.** —On principle there is no reason why a trespass to the person, whether in the form of assault, battery,

[24] Phelps v. Church of Our Lady, 99 Fed. 683.

[25] Ackerman v. Lyman, 20 Wis. 454.

or false imprisonment, should not admit of an election between the tort and quasi-contractual remedies in those cases in which the personal injury to the plaintiff is accompanied by a temporal benefit to the defendant. But in an action based upon an assault or battery, such election will seldom be sought; for, either there is a simple personal injury of the plaintiff and no benefit to the defendant, or else the damages recoverable in tort so far exceed the amount recoverable in quasi-contract as to render a waiver of the tort clearly undesirable.

With reference to false imprisonment, however, some interesting cases have arisen. In one case[26] the plaintiff had been falsely imprisoned as a lunatic by township officials; while thus imprisoned he was compelled by them to render services for a contractor, who paid the township therefor. The court correctly decided that the plaintiff might maintain an action for money had and received and recover the amount so paid. In another case[27] a free negro had been restrained by force and compelled to work for the defendant as his slave. It was held that he might recover on a count for work and labor. In answer to the defendant's contention that the action should have been for false imprisonment, the court said: "Where one does work for another by compulsion, whom he is under no legal or moral obligation to serve, the law will, I think, imply and raise a promise on the part of the person benefited thereby, to make him a reasonable recompense."

[26] Abbot v. Town of Fremont, 34 N. H. 432.
[27] Peter v. Steel, 3 Yeates 250 (Pa.).

Nevertheless, some of the more conservative courts do not allow an election in these cases of false imprisonment. Thus, in an Alabama case[28] the plaintiff, a prison convict, who had been compelled by the defendant, a convict-labor contractor, to work on holidays in violation of a statute, was denied a recovery on a count for work and labor, the court taking the ground that his remedy was in a tort action for false imprisonment.

17. **Deceit.**—The tort of deceit is committed when one person makes a false statement to another, not believing it to be true and intending him to rely upon it, and the person to whom the statement is made subsequently relies upon it to his damage.[29] Such damage to the party deceived may or may not involve a benefit to the deceiver; but very often it does, as where a man by fraudulent representations obtains goods or money or services. If goods are obtained the case is one of simple conversion and recovery in quasi-contract is allowed in the less conservative jurisdictions, on principles already considered in § 13. If money is obtained, the propriety of a recovery in quasi-contract is obvious and this action is generally allowed.[30]

On principle, assumpsit should be allowed for services fraudulently obtained and the count for work and labor seems particularly adapted to that purpose. The quasi-contractual right was recognized in a Missouri case,[31] in which the plaintiff, an ig-

[28] Sloss Iron & Steel Co. v. Harvey, 116 Ala. 656, 22 So. 994.
[29] See subject, TORTS.
[30] Johnson v. Cate, 77 Vt. 218, 56 Atl. 830.
[31] Hickam v. Hickam, 46 Mo. App. 496.

norant negro woman, had continued to serve the defendant, her former master, for many years after the abolition of slavery, in reliance upon his fraudulent representation that she was still his slave. So, too, by the better view recovery is allowed where the plaintiff, in reliance upon the defendant's false representations, has entered into a void marriage with him,[32] or has been deceived by him into the belief that the marriage relation has been assumed,[33] and has rendered him a housekeeper's services accordingly. However, some courts have been very slow to admit the right of waiving the tort where the benefit to the defendant is in the nature of services.[34]

18. **Other torts.**—Upon similar principles recovery is allowed or denied in quasi-contractual actions based upon other torts. Thus, in the leading case of Lightly v. Clouston,[35] Lord Mansfield held that a master might waive the tort and recover in assumpsit for work and labor performed by his apprentice for the defendant who had tortiously enticed the apprentice away from his master's service. Again, in the common case where one man has usurped a public office to which another is rightfully entitled and has received the fees and salary attaching to the office, the courts, while on grounds of public policy denying a recovery by the person entitled in an action against the state or municipality,[36] do allow him to maintain an action for money

[32] Higgins v. Breen, 9 Mo. 497.
[33] Mixer v. Mixer, 2 Cal. App. 227, 83 Pac. 273.
[34] Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892.
[35] 1 Taunt. 112 (Eng.).
[36] Board of Auditors v. Benoit, 20 Mich. 176.

had and received against the usurper.[37] Similarly it might be expected that the owner of a patent or copyright would be allowed to sue in assumpsit for benefits derived through infringement; but this matter is regulated largely by statute and it cannot be said that the quasi-contractual remedy has been established although its propriety has been judicially affirmed.[38]

19. **Election.**—Assuming that the plaintiff may, in a particular case, elect between a tort action and an action of assumpsit, we are still confronted with an important question: what will constitute an election that will be binding upon the plaintiff? It has been judicially affirmed that an election should be regarded as made whenever the plaintiff has done such an unequivocal act as to indicate to the other party that he has made a choice;[39] but the cases can scarcely be said to bear this out as a general rule. On the other hand it has been argued that "an election by the party having a choice should not be conclusive upon him until he has done an act making it impossible for him to choose again, or making it injurious to the public or unjust to the opposite party."[40] The result, as might be expected, is a conflict of authority.

Upon some points the courts are agreed. Thus a demand for the proceeds of converted goods is not an election to sue in assumpsit,[41] although an

[37] Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N. E. 983.
[38] May v. Logan, 30 Fed. 250.
[39] Per Lord Blackburn, Scarf v. Jardine, 7 App. Cas. 345 (Eng.).
[40] Professor Corbin, 19 Yale Law Journal, p. 221.
[41] Baker v. Hutchinson, 147 Ala. 636, 41 So. 809.

actual acceptance of such proceeds is an election.[42] So, too, the pursuit of one remedy to judgment is generally regarded as a conclusive election.[43] The chief conflict seems to be over the effect of the mere commencement of an action. Certainly this is an "unequivocal act"; and yet it is frequently possible to have the action dismissed upon payment of costs without either injury to the public or injustice to the opposite party. According as the courts incline to one or the other of these two views as to what constitutes an election, so it seems, do they decide what is the effect of beginning an action upon the plaintiff's right of election.[44] The weight of authority appears to be that such an act is conclusive.[45]

20. **Same subject—Joint tort-feasors.**—According to the rule generally prevailing in this country the liability of tort-feasors is both joint and several; that is to say, if two or more join in the commission of a tort the plaintiff may treat all of them or any of them as liable to the full extent of the damages, although, of course, he will be allowed but one satisfaction.[46] Now just as it may happen that none of the tort-feasors is benefited by the tort, so it may happen that one of them is benefited while the others are not. In such a case, by weight of authority, recovery in quasi-contract may be had against the party benefited but not against the other party.[47] Such considerations complicate the ques-

[42] Brewer v. Sparrow, 7 Barn. & Cr. 310 (Eng.).
[43] Bacon v. Moody, 117 Ga. 207, 43 S. E. 482.
[44] Woodward, Quasi-Contracts, § 298.
[45] See cases collected, 15 Cyc. 260, notes 51, 52.
[46] See subject, TORTS.
[47] Patterson v. Prior, 18 Ind. 440.

tion of election when joint tort-feasors are involved and the law is accordingly even more uncertain as to whether a tort action or an action of assumpsit shall lie than where but one tort-feasor is concerned.

In one leading case[48] it was held that an unsatisfied judgment obtained in an action of assumpsit against one joint tort-feasor was a bar to a subsequent action of tort against another, the court taking the ground that the mere commencement of the first action was in itself a waiver of the tort against both tort-feasors; but in another leading case[49] it was held that the commencement of an action of assumpsit against one joint tort-feasor could have no effect upon the plaintiff's right to maintain an action in tort against the other, the court taking the ground that nothing short of an actual satisfaction could have that effect. On principle it would seem that, since the liability of joint tort-feasors may be treated as several in a tort action and is several only in quasi-contract, the right of the plaintiff to an election as against one of them ought to be unaffected by any proceedings taken by him against another, subject only to the limitation that he must not be permitted to have a double satisfaction for the same wrong.

[48] Terry v. Munger, 121 N. Y. 161, 24 N. E. 272.
[49] Huffman v. Hughlett & Pyatt, 11 Lea 549 (Tenn.).

CHAPTER III.

RECOVERY FOR BENEFITS CONFERRED UNDER DURESS.

21. **In general.**—If recovery in quasi-contract is allowed for benefits obtained by the defendant's tort on the theory that it would be inequitable to permit the defendant to retain them without compensating the plaintiff, it seems to be going but a step farther to allow a recovery for benefits obtained by the defendant's fault falling just short of a tort. Accordingly it is not surprising that the law allows a recovery in quasi-contract for a benefit bestowed upon the defendant by the plaintiff while under the influence of compulsion unjustifiably imposed by the defendant. It is impossible to state with exactness just what will constitute such compulsion; the law upon the subject is in process of development and the delimitation of the field is, therefore, incomplete.

By the ancient common law an obligation might be avoided by proving that it was entered into by the obligor while under the compulsion of physical violence or imprisonment either actual or threatened. Such compulsion was known as duress.[50] Equity went far beyond this in its doctrine of undue influence and often afforded relief from the binding effects of an act done under moral coercion or under the influence of unfair persuasion.[51] The

[50] Wald's Pollock on Contracts, p. 728.

[51] Wald's Pollock on Contracts, p. 732 and following.

modern law of recovery for benefits conferred under compulsion or constraint seems to be derived from these two sources. It is a fusion of the principles of duress with those of undue influence. The results of this fusion must be sought in the decided cases. These naturally fall into different classes exhibiting different forms of compulsion. Some of the more important of these classes will be considered in this chapter.

22. **Duress of person.**—The cases involving duress of the person show in marked degree the influence of equity. This is illustrated by a modern Massachusetts case.[52] The plaintiff sought to recover a sum of money obtained by the defendant through an assignment of the plaintiff's share in her father's estate. There was evidence to show that she had executed this assignment under the following circumstances: her son had confessed to stealing a sum of money from the defendant; her husband's health was such that she feared he would become insane if he learned of the theft; the defendant, knowing of her fears, threatened to tell her husband of the theft unless she should assign to the defendant her share in her father's estate; actuated by this threat she executed the assignment in question. Here was no duress of the person, such as the old common law would have recognized, there being neither actual nor threatened imprisonment or physical violence; but the dictates of justice in the case are obvious and equity would doubtless have treated it as a clear case of undue in-

[52] Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555.

fluence. The court held that this evidence, if believed by the jury, would warrant a recovery of the money paid on the ground that "the fear was reasonable, and a sufficiently powerful motive naturally to overcome self-interest, and therefore the plaintiff had a right to avoid her act."

23. **Duress of goods.**—Under the old common law neither actual nor threatened detention or destruction of property would constitute a defense to a purely legal action upon a contract; yet, in accordance with the equitable nature of the action for money had and received, a recovery upon such a count was allowed as early as 1731 in the leading case of Astley v. Reynolds,[53] where the defendant had obtained money from the plaintiff by refusing to surrender certain valuable plate until the money demanded was paid, the court regarding it as "payment by compulsion." In a leading American case[54] recovery upon a similar count was allowed for money paid to secure the release of a raft which the defendant forcibly detained as a means of exacting boomage fees illegally demanded. In another leading case[55] recovery was allowed for money paid by a mechanic to secure the release of his chest of tools which defendant forcibly detained and refused to deliver until the plaintiff discharged a third person's debt to the defendant.

The principle has been applied to various types of cases: thus, assumpsit has been allowed for

[53] 2 Strange 915 (Eng.).
[54] Chase v. Dwinal, 7 Greenl. 134 (Me.).
[55] Cobb v. Charter, 32 Conn. 358.

freight illegally exacted by a carrier and paid in order to secure release of the goods;[56] for money paid to secure the release of goods wrongfully detained by customs officers;[57] for money paid to secure the surrender of deeds wrongfully withheld;[58] and even for money wrongfully exacted by a corporation as a condition precedent to the transfer of certain shares of stock on its books.[59] It may sometimes appear that the plaintiff's circumstances are such that he could get along very well without his goods until he might obtain them by means of legal process and that therefore he does not act under any very real compulsion in making a payment to secure their release. Accordingly it has been suggested that recovery on this ground may be confined to cases in which the money was paid to avoid serious loss or inconvenience;[60] but the decided cases do not bear out this restriction. Such a limitation would be difficult to apply; besides the defendant's conduct is, in all of these cases, essentially oppressive and burdensome and altogether inequitable. Substantial justice is done by compelling him to make restitution.

24. **Interference with real property.**—On principle it is difficult to distinguish between compulsion by withholding the possession of goods and compulsion by withholding the possession of lands; but it would be unsafe to conclude that because money

[56] Tutt v. Ide, 3 Blatchf. 249 (U. S.).
[57] Irving v. Wilson, 4 Term Reports 485 (Eng.).
[58] Oates v. Hudson, 6 Exchequer 346 (Eng.).
[59] Bates v. New York Ins. Co., 3 Johns. Cas. 238 (N. Y.).
[60] Fargusson v. Winslow, 34 Minn. 384, 25 N. W. 942.

paid to secure the possession of personal property under certain circumstances can be recovered there must, therefore, be a recovery in the same form of action for money paid to secure the possession of real property under similar circumstances. The possession of land is very apt to be based upon an asserted title; and, owing to the importance attached by the law to property in land, it has been held that the title to land cannot be tried in an action of assumpsit.[61] Where, however, there is no dispute as to title and the withholding of possession is a clear case of extortion, there would seem to be no objection to the remedy, although the exact point is unsettled.

It not infrequently happens that an owner, though left in the possession of his land, is disturbed in the enjoyment of his full property rights by the oppressive and unjustifiable creation of a cloud on his title by the assertion of an unfounded claim. If, in such a case, he pays money to free his title from such a cloud, it is generally held that he may recover the money so paid. Thus, recovery has been allowed for money paid to secure the discharge of an invalid mechanic's lien;[62] for money paid in discharge of an illegal demand in order to secure the release of a mortgage;[63] and for money paid to prevent the sale of mortgaged property by an abuse of a power of sale contained in the mortgage.[64]

25. **Interference with business.**—The right to en-

[61] King v. Mason, 42 Ill. 223.
[62] Joannin v. Ogilvie, 49 Minn. 564.
[63] First Nat'l Bank v. Sargeant, 65 Neb. 594, 91 N. W. 595
[64] McMurtrie v. Keenan, 109 Mass. 185.

gage in business is as well recognized by the law as the right to hold property. And the exercise of this right is often of as vital importance to the individual as the exercise of his right to hold property. Indeed one of the reasons most frequently assigned in support of a recovery of money obtained by duress of property is that the use of the property in question was necessary to the plaintiff in the pursuit of his calling or in the conduct of his business. It logically follows that if interference with property may be regarded as duress, interference with business may also be regarded as duress. And so the cases hold. The principle is well illustrated by a Wisconsin case.[65] The plaintiff corporation had sustained a fire loss while a tenant of the defendant. In order to obtain the insurance money, which it must do at once in order to go on with its business and meet outstanding contracts, it must procure the signature of the defendant to the proofs of loss. Thereupon the defendant took advantage of the plaintiff's necessities and refused to join in the proofs until the plaintiff paid an unjust demand of $666.74. This, the court held, constituted duress.

A Massachusetts case[66] illustrates the same principle as applied to extortion by a labor union. Says the court: "We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his

[65] Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 72 N. W. 45.
[66] Carew v. Rutherford, 106 Mass. 1.

workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back." Similarly in a New York case[67] a member of a musicians' union was allowed to recover a fine wrongfully imposed upon him by his union and paid by him in order to avoid suspension. The court said: "He feared that if he did not pay the money on that day the president's threat would become effective and his means of earning a livelihood in his chosen occupation destroyed. That threat, coupled with the fear induced thereby, amounts in law to duress."

26. **Non-performance of duty by public officer.**— Another well recognized basis of recovery is the exaction of illegal fees by a public officer. It is settled that any excess exacted by him as a condition to the performance of his duty may be recovered. In some of the leading cases the officer's conduct would have constituted duress quite apart from his official character. Thus, in Lovell v. Simpson[68] the sheriff refused to set the plaintiff at liberty until paid an illegal fee, a clear case of false imprisonment. Again in Hills v. Street[69] an officer refused to surrender the plaintiff's goods until paid an ex-

[67] Fuerst v. Musical etc., Union, 95 N. Y. Supp. 155.
[68] 3 Esp. 153 (Eng.).
[69] 5 Bing. 37 (Eng.).

cessive fee, an equally clear case of duress of goods. But the policy of the law is to secure faithful service of the public by public officers and to protect to the fullest extent those members of the public who may have occasion to deal with them. Accordingly it is, as a rule, unnecessary to show circumstances amounting to actual coercion; it is enough to show that the officer has refused to perform his duty, whatever it was, until paid the excess demanded. Thus, recovery has been allowed against a parish clerk for excessive fees charged for permission to make extracts from the parish records,[70] against a county surveyor for illegal fees exacted for his services,[71] and against the treasurer of a state university for excessive tuition fees.[72]

The general rule was thus stated in a leading American case:[73] "We think that sound policy requires us to hold that a public officer who, *virtute officii,* demands and takes as fees for his services, what is not authorized or more than is allowed by law, should be compelled to make restitution." And the same policy, looking in this case more to the ultimate service of the public than to immediate justice between individuals, has led the courts to hold that the officer is liable although he has acted in good faith and has turned over the proceeds to the public treasury.[74]

[70] Steele v. Williams, 8 Exch. 625 (Eng.).

[71] Hays v. Stewart, 8 Texas 358.

[72] Niedermeyer v. Curators of the University of Missouri, 61 Mo. App. 654.

[73] American Steamship Co. v. Young, 89 Pa. St. 186.

[74] Ogden v. Maxwell, 3 Blatchf. 319 (U. S. C. C.).

27. **Non-performance of duty by public service corporations.**—A public service corporation is not a public official and yet, by holding itself out as ready to serve the public, it takes upon itself a general duty to serve the public without personal discrimination at reasonable rates.[75] The policy of encouraging the performance of this duty, together with the advantageous position usually occupied by one of these corporations in dealing with an individual member of the public, has led many courts to treat a refusal by one of them to render service except on condition of being paid an excessive rate as analogous to the case of a public officer who demands excessive fees. A few courts fail to see the coercion in such a case.[76] Some courts hold that no recovery may be had unless a protest was made at the time of payment.[77] But other courts take a more liberal view and look upon protest as a useless formality. The position of these courts is thus expressed by Beck, J., in a leading Iowa case[78] in which the plaintiff sought to recover excessive freight charges in an action against a railway company:

"Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their

[75] See subject, PUBLIC SERVICE COMPANIES.

[76] Potomac Coal Co. v. Cumberland & Penn. R. R., 38 Md. 226.

[77] Monongahela Navigation Co. v. Wood, 194 Pa. St. 47, 45 Atl. 73.

[78] Heiserman v. Burlington, C. R. & N. Ry., 63 Iowa 732.

power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railway company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss will result. * * * The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements."

28. **Usurious interest.** — Anciently interest was not recoverable upon an overdue payment. Nowadays reasonable interest is everywhere allowed as a fair compensation for the use of money; but most jurisdictions have laws against usury or the exaction of excessive interest. These laws are avowedly passed for the protection of the borrower; they recognize the constraining effect of financial necessities and the unequal positions of borrower and lender. Under none of them may the lender recover usurious interest which the borrower has agreed to pay. Many of them allow a statutory remedy to the victimized borrower; but ordinarily, unless the statutory remedy is expressly made exclusive, a borrower who has paid usurious interest may recover the excess in a quasi-contractual action. The theory under which this action is supported is thus stated in a Pennsylvania case:[79] "That the payment of

[79] Philanthropic Building Ass'n v. McKnight, 35 Pa. St. 470.

usurious interest is not a voluntary payment in any such sense as to entitle the receiver to retain the sum paid above legal interest is too well settled to admit of doubt. The money is paid under the constraint of a formal though illegal contract. That contract itself was obtained by oppression, by taking advantage of the necessities of the borrower, and, of consequence, so was the usurious interest paid under it."

It may be questioned whether there is any real compulsion at the time of paying the usurious interest in the ordinary case; the borrower's necessities may have led him to make the contract in order to obtain the money, but, having already obtained the needed money, is he compelled by financial necessity to pay the interest? It would seem that the only compulsion is to be found in his unenforcible contract. And yet, as the passage above quoted shows, the law appears to regard this contract as continuing the constraint. Possibly the explanation is that most men feel a certain constraint in the mere existence of a formal contract quite apart from considerations of its enforcibility.

CHAPTER IV.

RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

29. **In general.**—It is obvious that no constraint or compulsion can be more real or effective than that of the law itself; but it might be supposed that the law would under no circumstances compel the defendant to restore that which it had itself compelled the plaintiff to surrender. The law is indeed not quick to compel restitution in such a case; but it does not insist upon its own infallibility. The law recognizes that its own processes may be abused; that its agents may sometimes be mistaken and by their mistakes compel a surrender of property where no surrender should have been required; that the imperfections of legal machinery sometimes leave a party in a situation in which injustice will be done if relief is not afforded. Such considerations account for a large class of cases in which recovery is allowed for money obtained by the defendant from the plaintiff with the assistance of the law itself.

30. **Threatened litigation.**—It is plain that money obtained by a mere threat of litigation is not obtained by the act of the law itself. Furthermore it is not to be presumed that litigation will result in aught but justice to the litigants. Ordinarily the party threatened will have his day in

court before his liberty is restrained or the enjoyment of his property is disturbed. The assertion of one's rights in court should not be frowned upon. Hence it is generally held that money obtained under a mere threat of litigation cannot be recovered.[80] Of course a threat of litigation may be made in such a way as to include a threat amounting to duress, as where prosecution and immediate arrest are threatened. The threat of prosecution alone would be a mere threat of litigation and would not amount to duress, but the threat of arrest adds that which amounts to personal duress.[81]

31. **Money paid after action begun but before judgment.**—If the threat of litigation does not constitute a basis for recovery it is difficult to see how the mere commencement of litigation should do so. There is the same presumption that justice will be done, and the party sued still has his day in court. To be sure, the constraining effect of an action started may be greater than that of an action threatened, but the party suing may sue if he will and the party sued may fight if he will, and the law should not discourage a settlement of their dispute by leaving it open to the party paying to show in a later case, in which he shall be plaintiff, that he really did not owe the amount paid and only paid it because of the litigation. Said Lord Halsbury in a leading case,[82] which denied a recovery for money paid after the commencement of an action: "The principle is

[80] Holt v. Thomas, 105 Cal. 273, 38 Pac. 891.
[81] Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010.
[82] Moore v. Vestry of Fulham, (1895) 1 Q. B. 399 (Eng.).

based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defense to the original action." The case represents the law.

32. **Same subject—Goods seized under process.**—Even where the money is paid to secure the release of goods seized under process of attachment, the same principles control. The party paying is protected by the bond in the attachment suit and may contest the claim if he will. Thus where a plaintiff had, without contest, paid a claim, to secure the payment of which his boat had been attached, the court refused to recognize an instance of duress of goods.[83] Said Garrison, J., "The proposition maintained * * * is that money paid under regular legal process in a judicial proceeding, without contest, and with a full knowledge of the facts, is, in the absence of fraud, not recoverable."

33. **Same subject—Abuse of process.**—It should be remembered, however, that the process of the law may be abused. Malicious abuse of process is a recognized tort.[84] Money so obtained might, it would seem, be recoverable in quasi-contract under the doctrine of waiver of tort; but it may be recovered as money obtained under compulsion. This is illustrated by a Massachusetts case.[85] The defendant had in his possession a promissory note upon

[83] Turner v. Barber, 66 N. J. L. 496, 49 Atl. 676.
[84] See subject, TORTS.
[85] Chandler v. Sanger, 114 Mass. 364.

which he knew that the plaintiff was not liable. In order to extort money from the plaintiff he brought an action upon this note and then levied an attachment upon a quantity of ice loaded in the plaintiff's wagons and ready for immediate distribution to the plaintiff's customers. In order to obtain possession of the ice for delivery to his patrons the plaintiff paid the claim. He afterwards brought an action for money had and received. It was held that he could recover. Said the court: "Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion."

34. **Money paid after judgment—Res judicata.**—Money paid in obedience to a judgment of a court may fairly be said to be paid under compulsion. It might, therefore, be supposed that if it could be shown that money so paid ought not in equity and good conscience to be retained by the defendant, the plaintiff could recover the money in an action of assumpsit. But ordinarily such a recovery may not be had. The law provides regular ways for attacking judgments either by way of appeal or by direct attack; but so long as the judgment stands, it is protected by the doctrine of res judicata (adjudged

matter), under which it must be regarded as being both valid and just. This is illustrated by the leading case of Marriot v. Hampton.[86] The defendant Hampton had recovered judgment against Marriot in a former action for goods sold. As a matter of fact Marriot had paid for the goods, but had lost the receipt, his only evidence of payment. After paying the judgment he found the receipt and then sought to get his money back in an action for money had and received, contending that under the circumstances it would be inequitable to permit the defendant to retain the money so paid; but the court held that he could not recover. Said Lord Kenyon: "I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there could be no security for any person."

35. **Same subject—Void judgment.**—Sometimes a court acts without jurisdiction. In such a case its acts are of no legal effect and any judgment which it may then render is therefore void. To such a judgment the doctrine of res judicata has no application and will accordingly be no obstacle to the recovery of money paid thereunder. On the other hand, there may well be a question as to whether the law can recognize a void judgment as having any constraining effect upon the person against whom it is rendered. Some courts hold that it cannot, and, unless the debtor's money or goods have been taken by execution based upon the void judg-

[86] 7 Term Reports 269 (Eng.).

ment, they deny a recovery for want of a showing of any real compulsion.[87] This qualification seems narrow and technical, for most suitors cannot possibly know, except in rare instances, that the apparently regular judgment of a court is in fact void and of no effect.

36. **Same subject—Judgment subsequently reversed.**—Sometimes execution issues and a man's property is taken in satisfaction of a judgment that is subsequently reversed. Here is the clearest sort of compulsion and it is evident that, after the judgment has been reversed, the doctrine of res judicata can have no application. Accordingly it is generally held in such a case that a quasi-contractual action may be maintained.[88] Sometimes the party against whom the judgment is rendered pays it, although no execution has been issued and although an appeal is pending or intended. It might be thought that in such a case the courts would have difficulty in finding any real compulsion. Some of them do and accordingly deny a recovery just as in the case of money paid in satisfaction of a void judgment;[89] but most of them allow a recovery for money paid in satisfaction of a judgment rendered by a court with full jurisdiction, if it is subsequently reversed for error in the proceedings.[90] Such a judgment they distinguish sharply from a void judgment, treating it as valid until reversed and therefore as capable

[87] Elston v. City of Chicago, 40 Ill. 514.

[88] Clark & Clark v. Pinney, 6 Cow. 297 (N. Y.), LEADING ILLUSTRATIVE CASES.

[89] Winston v. Nunez, 25 La. Ann. 476.

[90] Chapman v. Sutton, 68 Wis. 657, 32 N. W. 683.

of exercising a constraining effect upon the party against whom it is rendered.

37. **Same subject—Grounds of reversal.**—Of course a judgment may be reversed for an error that goes to the merits of the case or it may be reversed for an error that goes only to the procedure. Is it enough to entitle the party paying the judgment that it shall subsequently have been reversed or must it appear that the reversal was based upon the merits of the case? Some courts take the ground that mere reversal is enough.[91] Others, with more regard, it would seem, to the equitable character of the quasi-contractual obligation, deny a recovery where the reversal is based upon purely technical grounds. This view is well illustrated by a Missouri case.[92] Said the court: "The justice of the defendants' original claim is not only shown by the conceded facts of this case, but the justice of the judgment set aside was established by this court upon appeal therefrom. The defendants lost the benefit thereof by 'a slip' of their own procedure, and ought not to be compelled to refund the money which they originally received, and which, in equity and good conscience, they may retain."

38. **Recovery of taxes paid.**—Actions are often brought to recover money paid under the constraint of an illegal tax or assessment. Where there is no injustice in the retention of the tax, as where the tax itself is valid but the mode of its assessment or collection has been irregular, the quasi-contractual

[91] Hier v. Anhauser-Busch Brewing Assn., 60 Neb. 320, 83 N. W. 77.
[92] Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873.

basis of recovery is wanting and the action fails.[93] And where there has been no substantial compulsion, as where a party has paid although he need not have done so until after a hearing in court, the case must also fail.[94] But where the authority to levy the tax or make the assessment has been wholly wanting and the money has been paid to prevent an arrest of the person[95] or sale and seizure of personal property[96] or the creation of a cloud on the title to real property,[97] the case is on principle one of duress and a recovery is generally allowed. Since the taxing agencies of the government are often clothed with summary powers for the collection of taxes, the exercise of duress is not infrequent. In such cases a protest seems to be unnecessary, although evidence as to its presence or absence may be material upon the general question as to whether the payment was made voluntarily or under compulsion.[98]

39. **Compulsory discharge of another's obligation.**—It sometimes happens that the legal relations of a group of persons are such that one person is either directly or indirectly compelled to discharge another's obligation to a third person. The obligation may be one which, as between the plaintiff and the defendant, the defendant alone ought to have discharged, or it may be one which ought to have

[93] Long v. Village of Dundee, 159 Mich. 320, 123 N. W. 1098.

[94] Oceanic Steamship Co. v. Tappan, 16 Blatchf. 296 (U. S. C. C.).

[95] Preston v. City of Boston, 12 Pick. 7 (Mass.), LEADING ILLUSTRATIVE CASES.

[96] Bailey v. Goshen, 32 Conn. 546.

[97] Peyser v. Mayor of New York, 70 N. Y. 497.

[98] Jenks v. Lima Township, 17 Ind. 326.

been met by the two together. In the former case the question will arise as to whether the plaintiff has a quasi-contractual right to indemnity; in the latter case the question is whether he has a quasi-contractual right to contribution. In either case the basis of the plaintiff's claim must be that although the law has compelled the plaintiff to pay money or otherwise discharge an obligation to a third person, still, as between the plaintiff and the defendant, the amount now claimed by the plaintiff ought in equity and good conscience to have been paid by the defendant. In each case the quasi-contractual right to restitution is well established.

40. **Same subject—Obligation discharged by one not personally liable.** Sometimes a man's property may be liable for the discharge of an obligation for which another than himself is personally liable. Thus he may be the owner of land that is subject to a lien for unpaid taxes assessed to a former owner. Or he may be the purchaser of property that is subject to a mortgage given to secure a debt for which his vendor alone is personally liable. In either case he may be compelled to discharge another's debt in order to prevent the sale of his property under legal process. Similarly he may be the owner of a building that is subject to a mechanic's lien owing to the failure of a building contractor to pay his workmen's wages. Nichols v. Bucknam[99] was such a case. The plaintiff sued for money paid to prevent the enforcement of a lien for brick work. In delivering the opinion of the court Ames, J., thus

[99] 117 Mass. 488.

stated the principle applicable to all these cases: "It appears from the report that the plaintiff, in order to save his property from being sold on legal process, has been compelled to pay a debt which was really due from the defendant. Under such circumstances the law implies a request on the defendant's part, and a promise to repay; and the plaintiff has the same right of action as if he had paid the money at the defendant's express request."

Of course if recovery is allowed for money paid to prevent the sale of the plaintiff's property under process in satisfaction of the defendant's obligation, recovery ought also to be allowed where the property is actually sold under process for that purpose. Accordingly it has been held that an owner of land might maintain assumpsit against his grantor for money paid by him as purchaser at a foreclosure sale, where the mortgage foreclosed was one which his grantor was bound to pay, the court regarding the payment as made under compulsion of legal process for the benefit of the defendant.[1]

41. **Same subject—Obligation discharged by co-contractor.**—A surety is personally liable for his principal's debt. If he is sued upon his promise and compelled to pay that debt, he may, even in the absence of an actual contract between himself and his principal, maintain an action at law against him for indemnity.[2] If another has joined him as co-surety they are both liable for the debt as joint contractors.

[1] Hunt v. Amidon, 4 Hill 345 (N. Y.).
[2] Decker v. Pope, 1 Selw. N. P. 76 note (Eng.).

As joint contractors, although they should, as a matter of procedure, be sued together, each surety is liable for the whole of the debt and the property of either may be taken in full satisfaction thereof. If one co-surety has been compelled to pay the whole debt or more than his aliquot part of it, he may enforce contribution against the other surety in an action of assumpsit.[3] These rights of sureties to indemnity against their principals and to contribution against each other were first recognized only in equity, but they have been enforced at law since the time of Lord Mansfield. Their quasi-contractual character seems theoretically clear, although they are not consistently treated as quasi-contractual rights by the courts.

42. **Same subject — Obligation discharged by joint tort-feasor.**—As already pointed out in § 20, the liability of tort-feasors is in this country both joint and several; that is to say, if two or more persons negligently injure a man or his property, or commit a battery upon him, or libel him, or convert his goods, any or all of them may be sued as the plaintiff may elect. Suppose that one only is sued, that judgment is obtained against him, and that he pays the damages. Or suppose that all of them are sued, that judgment is obtained against all, but that, in accordance with the principles of joint liability, the property of one of them is seized by the sheriff and sold in satisfaction of the judgment. May the party who is thus compelled to pay for the wrong done by all have contribution in either of the two

[3] Golsen v. Brand, 75 Ill. 148.

cases? It seems that he may not; the law apparently has little sympathy with wrongdoers and in their case lets the loss lie where it falls. It may be thought that this harshness is scarcely justified where the plaintiff did not intend to do wrong but was merely negligent; but the courts do not appear to distinguish between the two classes of wrongdoers and the plaintiff appears to be barred by the fact that his conduct has been legally culpable. This is brought out in a recent decision of the United States Supreme Court involving the right of contribution between two persons who had negligently injured a third.[4] In denying a recovery the court said: "The general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled by law to pay all the damages for the wrong done."

In a large class of cases, however, a party is liable in tort not because he is personally at fault but because it is the policy of the law to make him liable for another's wrongful act or omission. In such cases there is less justification for the harsh rule against contribution between wrongdoers and recovery is frequently allowed. Thus where a master who has been personally free from blame has been compelled to pay damages to a third person on account of his servant's tort, there is no question but that he has a right of action against his servant for full indemnity. So where one of two partners had been compelled to pay damages to a third per-

[4] Union Stock Yards Co. v. Chicago, Burlington & Quincy R. R., 196 U. S. 217, 25 Sup. Ct. 226.

son on account of injuries received through the negligence of a driver who was employed by the partners, it was held that he might have contribution against the other partner.[5] Generally speaking it may perhaps be said that wherever the plaintiff has been free from fault the reason for denying contribution fails and recovery should therefore be allowed.[6]

[5] Wooley v. Batte, 2 Car. & Payne 417 (Eng.).
[6] Bailey v. Bussing, 28 Conn. 455.

CHAPTER V.

RECOVERY FOR BENEFITS CONFERRED WITHOUT REQUEST.

43. **In general.**—In sharp contrast to the cases in which the defendant has tortiously obtained a benefit from the plaintiff and to those in which he has unjustly compelled the plaintiff to confer a benefit upon him, is another group of cases in which the plaintiff has voluntarily and without so much as a request from the defendant bestowed a benefit upon him. At first impression it would seem unwise to allow a recovery in such a case; to do so would appear to restrict personal liberty by compelling men to pay for undesired benefits and to encourage intermeddling in others' affairs. Furthermore, such benefits are often intended as gifts for which it would be absurd to compel the recipient to pay. For these reasons it is the general rule that no recovery may be had for a benefit voluntarily conferred upon another without his request.[7] To this general rule there is a limited number of exceptions which will next be considered.

44. **Discharge of defendant's legal obligation.**—In accordance with the principle stated in the preceding section it is the general rule that the voluntary discharge of a man's legal obligation by another who acts without his request will give rise to

[7] Boston Ice Company v. Potter, 123 Mass. 28.

no quasi-contractual right. A man who without solicitation pays another's debt or performs his contract to deliver goods or to render services is ordinarily deemed an officious intermeddler with no just claim to restitution. There are, however, certain law-imposed obligations that constitute a well-recognized class of exceptions; the unsolicited discharge of one of them by one acting reasonably under a sense of moral obligation will entitle him to a recovery in assumpsit. There is perhaps no general test applicable to all these cases; these exceptions seem to have grown up independently of each other; and yet the principal reason for the exception in each case seems to be a very special public interest in the actual discharge of the obligation. Thus it is of special interest to the public that provision be made for the support of persons who are unable to provide for their own support. Accordingly a husband is at common law bound to support his wife; if he fails to do so one who, acting reasonably, supplies her with necessary food, clothing or medical attendance, may recover from the husband in an action of assumpsit the reasonable value of the necessaries supplied by him.[8]

45. **Same subject.**—The right of recovery against the husband for necessaries supplied the wife is frequently explained as one rising out of agency, the wife being called an agent of necessity; but since the husband is liable for the reasonable value of the goods and not for the price which she agreed that he would pay, and since he may be compelled to pay

[8] Morrison v. Holt, 42 N. H. 478.

although he may have previously said that he would not be liable for necessities supplied her, the agency theory is an obvious fiction.[9] The husband's liability is really quasi-contractual; he must pay for the benefit he has received in the discharge of his own obligation to provide his wife with necessaries.

At common law an infant's estate is liable for necessaries supplied the infant. This liability is sometimes referred to pure contract and the obligation is spoken of as an infant's contract; but it is clearly quasi-contractual, since the estate would be liable even though the infant were too young to have the faintest conception of the nature of an agreement and since the estate is liable not for what the infant agreed to pay but for the reasonable value of the necessaries supplied.[10] The same law holds and similar observations may be made as to the liability of an insane person's estate for necessaries supplied him.[11] A very similar liability exists in the case of a municipal corporation that is required by law to support the paupers within its bounds; if the municipality fails to discharge its obligation in a particular case one who reasonably supplies the pauper with necessaries may recover their value in an action against the corporation.[12]

46. **Same subject.**—It is also of great public importance that the dead be given prompt and decent burial. Accordingly the reasonable expenses incident to the proper interment of a deceased person's

[9] Cartwright v. Bate, 1 Allen 514 (Mass.).
[10] Woodward, Quasi-Contracts, § 202.
[11] Same.
[12] Trustees of Cincinnati Township v. Ogden, 5 Ohio 23.

body are at common law recognized as a charge against his estate. If the deceased left a will and his executor is known and present he is doubtless the proper person to contract for these expenses on behalf of the estate; but the deceased may not have left a will or appointed an executor, or the executor may be absent or possibly neglectful of his duties. In any of these cases it is well settled that any person who, being under all the circumstances an appropriate person, acts for the estate in the matter, is entitled to reimbursement.[13] Similarly the reasonable expenses incident to the interment of his deceased wife are chargeable to the husband. In case of his presence and readiness to act any intervention by another, as for example a relative of the deceased, must be regarded as officious;[14] but in case of his absence or neglect any appropriate intervenor, as a relative or neighbor, may defray the necessary expenses of the interment and recover from the husband.[15]

47. **Preservation of life.**—Suppose that a man is seriously injured and rendered unconscious in an accident. Ordinarily it is nobody's legal duty to render him assistance; but suppose that a bystander, impelled by a sense of moral duty, gets a conveyance and takes the injured man to a hospital. At the hospital a surgeon performs an operation upon the unconscious man that saves his life. May either the bystander or the surgeon recover for the services rendered? Obviously there is no contract right; but

[13] Patterson v. Patterson, 59 N. Y. 574, LEADING ILLUSTRATIVE CASES.
[14] Quin v. Hill, 4 Dem. Sur. 69 (N. Y.).
[15] Jenkins v. Tucker, 1 Henry Blackstone 90 (Eng.).

the services rendered by the bystander and the surgeon have saved the defendant's life; this was surely a benefit to him; and it is the policy of the law to protect and preserve human life. Why should not each of these men recover for the services rendered? As for the bystander, whose services were entirely unprofessional, it seems that the law, recognizing the purely humanitarian impulse that ordinarily prompts action in such cases, conclusively presumes that his services were gratuitous.[16] As for the surgeon, while his motive may in fact have been just as humane as that of the bystander, no such presumption is entertained. In one such case at least a recovery has been allowed.[17] The fact that he gains his livelihood by rendering just such services seems to account for the distinction. Doubtless the professional nurses assisting in the operation could recover upon the same principle.

48. **Preservation of property.**—Suppose that a man's house catches fire while he and his family are away from home. His neighbors go to the rescue. Some break open the doors and carry out his furniture. Others form a bucket brigade and eventually extinguish the flames, thereby saving most of the building. Have the neighbors a right to compensation for their services? There is clearly no contract right; but the neighbors have undoubtedly conferred a benefit upon the owner of the property; their conduct cannot in any view be regarded as officious; and it is certainly a matter of public importance that

[16] Woodward, Quasi-Contracts, § 201.
[17] Cotnam v. Wisdom, 83 Ark. 601, 104 S. W. 164.

property should be saved. Why then should the neighbors not have a quasi-contractual right to compensation? The answer again appears to be that the law takes note of the fact that such services are ordinarily rendered from motives of humanity alone, with the inevitable result that such services are conclusively presumed to have been rendered gratuitously.[18]

49. **Same subject—Property lost and found.**—Suppose that a man's horse wanders away and that another finds it, feeds it and cares for it until the owner comes and takes it away. Or suppose that his boat is cast up by the waves and that another finds it, makes repairs necessary to its preservation, and keeps it in a safe place until the owner comes and gets it. May he recover for his services in either case? His motive may have been primarily humanitarian in each case, but it is common knowledge that lost property is ordinarily taken into possession with the expectation that the owner, if he subsequently claims it, will reimburse the finder for any expenses that may have been incurred as necessary to its preservation.

Furthermore, the owner will have an option: he may appropriate the benefit by taking possession of his lost property or he may decline to appropriate it by leaving the property in the hands of the finder. For such reasons, perhaps, it has long been the law that a finder of lost property is entitled to recover from the owner who subsequently takes possession any expenses that he may reasonably have incurred

[18] Bartholomew v. Jackson, 20 Johns. 28 (N. Y.).

in and about its preservation.[19] It might be argued that whenever any person, acting reasonably in another's absence, incurs expenses or renders services about the care of the other's property under circumstances negativing an intention to act gratuitously, such person ought to have a quasi-contractual right against the owner who subsequently avails himself of such care; but the common law does not appear to recognize any such general principle.

[19] Chase v. Corcoran, 106 Mass. 286.

CHAPTER VI.

RECOVERY FOR BENEFITS CONFERRED BY MISTAKE.

A. Considerations Affecting Recovery.

50. **In general.**—If one man pays money to another in the belief that he is paying a debt when in truth there is no debt to be paid, the injustice of permitting the payee to retain the money, at least in the ordinary case, is apparent. So too if a man pays money or delivers goods or does work with the understanding that he is getting something in return, either tangible property or a legal obligation, when in fact he is getting nothing in return, it is equally apparent that injustice will result in the ordinary case if the recipient of the benefit is permitted to retain it without making some compensation. In each of these cases he may have been guilty of no legal or moral wrong in receiving the benefit, still he has benefited at the expense of another innocent person and ought in fairness to make restitution. This plain dictate of justice and common sense is the basis of one of the most important groups of cases in the whole field of quasi-contract.

51. **Mistakes of fact and of law distinguished.**—As a matter of justice it would seem to make little difference whether a plaintiff seeking a recovery of money paid under mistake had paid the money because of his ignorance of fact or his ignorance of law. If A pays B $50 in the mistaken belief that

a particular act for which A has agreed to pay B $50 has been done, all would agree that A ought to get his money back. But suppose that A pays B $50 which he does not owe but thinks he owes on account of a mistaken notion as to the legal effect of a certain contract. Is his right to recover any less clear in this case than in the other? In each case A has paid B $50 which he did not owe in the mistaken belief that he did. But the law makes a sharp distinction between the two cases. In the first case A acted under a mistake of fact; he relied upon the existence of a fact upon which, if it had existed, the law would have based a duty to pay B $50. In the second case he relied upon the existence of a rule of law which, if it had existed, would have made it his duty to pay B $50. In the first case the law will allow a recovery; in the second it will not. Owing to a perversion of the maxim that "Every man is presumed to know the law," a maxim which should be limited in its application to those cases in which a wrongdoer is seeking to excuse himself by pleading ignorance of the law, it has been held for more than a century that, regardless of the natural equities of the case, assumpsit will not lie for money paid under a mistake of law.[20] This general rule is subject to a few exceptions.

52. **Effect of payor's knowledge or belief.**—It is essential to the plaintiff's right to recover in this class of cases that he should be able to show that he has actually relied upon a mistaken belief as to a matter of fact. Consequently where he has paid the

[20] Bilbie v. Lumley, 2 East 469 (Eng.), LEADING ILLUSTRATIVE CASES.

money because of a mere inability to prove that it was not owed he cannot claim to have paid under a mistake of fact. This is strikingly shown in a New York case.[21] The plaintiff had paid a balance claimed upon a bond and mortgage although insisting at the time of payment that he was paying too much by $200, owing to the payee's failure to credit two previous payments. Later he discovered proof of the previous payments and sued to recover the amount of the overpayment. Held, that he could not recover. Said the court: "Ignorance of a fact is one thing; ignorance of the means of proving a fact is another. When money voluntarily paid is recovered back, it is because there was a mistake as to some fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove a fact, known to a party when he makes the payment, cannot authorize a recovery back of the money."

53. **Same subject—Forgotten facts.**—~~Where, however,~~ So, the plaintiff is able to show that at the time of payment he was acting under an erroneous belief, his recovery will not be defeated by proof that he once had full and complete information upon the subject and that he was merely the victim of forgetfulness. That explains his mistake but does not disprove its existence. In an Ohio case,[22] in which the plaintiff sought to recover money paid by him upon a promissory note in ignorance of its previous

[21] Windbiel v. Carroll, 16 Hun 101 (N. Y.).
[22] Norman v. Will, Ohio Dec. 261.

payment by another party, the lower court charged the jury in substance that if the plaintiff had been, previously to said payment, informed of the note having been paid by the other party, then he could not recover it back again. On appeal this instruction was disapproved. Said Richard, J., "According to the instructions of the court below, a man's rights would depend upon the strength of his memory. We do not think so."

54. **Payor's assumption of risk—Compromise.**—Of course money may be paid by one who voluntarily assumes the risk of error. He may think that he does not owe the money but prefer to pay it in order to prevent litigation or hard feelings or to guard against the possibility of seeming to repudiate a just debt. In such a case he cannot truthfully say that he has paid under an actual mistake of fact and accordingly he cannot recover. Similarly, where facts are in dispute and the disputants agree to waive all further question as to the truth or falsity of the facts in question and proceed to compromise, money paid under such a compromise cannot be recovered by the payor upon proof that he did not owe the amount paid.[23] Considerations of justice and policy are both against such a recovery: of justice because he voluntarily assumed the risk and did not pay under a real mistake; of policy because it is to the interest of the public that there be an end of litigation. On the other hand, where both parties assume the existence of a particular fact, which if it did

[23] Sears v. Grand Lodge of Ancient Order of United Workmen, 163 N. Y. 374, 57 N. E. 618.

exist would give rise to a liability to pay damages, and their only dispute is as to the amount of damages, the compromise of this dispute by the payment of an agreed sum cannot fairly be said to have involved an assumption of risk as to the existence of the basic fact essential to liability. By mistake that basic fact was taken for granted and was not the subject of compromise. Upon proving the mistake the money so paid should be recovered.[24]

55. **Same subject—Illustrations.**—To illustrate the distinction: suppose that A has been riding B's horse and that the horse dies; that B accuses A of having caused the death of the horse by hard riding and that A disputes this fact; and that they finally compromise their dispute by A's paying B one-half of the horse's value. After such a payment A could not recover by showing that his riding had not caused the death of the horse. Suppose, on the other hand, that A has ridden B's horse; that a stableman informs them that the horse has died as a result of A's hard riding; that they dispute as to what damages A should pay, he contending that the horse was worth not over $100 and B contending that it was worth $300; and that they settle this dispute by A's paying B $200. After the payment the stableman informs them that he was mistaken as to the death of B's horse, that animal being still alive and uninjured. It is obvious that in such a case A's recovery should not be barred by the fact of the compromise.

56. **Mistake as to collateral fact.**—Suppose that

[24] Rheel v. Hicks, 25 N. Y. 289; compare Wheadon v. Olds, 20 Wend. 174 (N. Y.), LEADING ILLUSTRATIVE CASES.

A understands that B is willing to pay $1,500 for a town lot that is owned by C. With a view to making a profit A offers C $1,250 for the lot. C accepts the offer, A pays the money and C conveys the lot. Then A discovers that B did not wish to buy C's lot and that the lot was not in fact worth more than $1,000. May A recover of C the difference between the amount paid and the real value of the lot? It would be strange if he could, and yet it is plain that he has acted under a mistake of fact, in the absence of which the purchase would not have been made. The explanation is in the nature of the fact as to which the mistake was made. The fact here was not one upon which his liability was based, for he actually got all he bargained and paid for, viz., the town lot. He had simply made a bad bargain, that was all. Such facts, since they are not relied upon as a basis of liability at the time the payment is made, are commonly called "collateral" or "extrinsic." As a recent writer has well pointed out, they have to do rather with the policy of making the payment than with the duty of payment.[25] As was said by the court in a leading case,[26] "As to such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded he must be held to his contracts."

57. **When defendant may justly retain benefit.**— It must not be forgotten that the basis of recovery for money paid under a mistake is that in such a

[25] Woodward, Quasi-Contracts, § 18.

[26] Dambmann v. Schulting, 75 N. Y. 55. See also Aiken v. Short, 1 Hurlstone & Norman 210 (Eng.), LEADING ILLUSTRATIVE CASES.

case it would ordinarily be against conscience to permit the defendant to retain the benefit without making compensation. If, then, the facts in a particular case are such that the defendant may justly retain the benefit notwithstanding the plaintiff's mistake, it would seem that he ought to be permitted to do so. And so the cases hold. Suppose, for example, that in a particular jurisdiction the Statute of Limitations for a contract debt is six years, that a debtor has owed his creditor seven years, but believes the debt has run only five years. He knows what the Statute provides and is therefore not mistaken as to the law; but, owing to his mistake of fact, supposes that the defense of the Statute will not be available for another year. Accordingly he pays the debt at a time when he has a perfect defense. And yet he cannot get his money back.[27] He has only done what in justice he should have done. Similarly where a plaintiff sued to recover an overpayment on a promissory note the defendant was permitted to defeat the action by showing that the face of the note was for less than the amount actually due.[28] So where interest was paid upon a note which did not provide for interest, but which the payor supposed did provide for interest, inasmuch as he and the payee had agreed when the note was drawn that it should provide for it, the court held that the payor could not recover the amount so paid, remarking that "by two blunders the parties have come out right at last."[29]

[27] Moses v. Macferlan, 2 Burr. 1005 (Eng.).
[28] Foster v. Kirby, 31 Mo. 496.
[29] Buel v. Boughton, 2 Denio 91 (N. Y.).

58. **Same subject—Plaintiff negligent and defendant's position changed.**—The mere fact that the plaintiff's mistake is owing to his own negligent failure to ascertain the facts will not as a rule bar his recovery. As was said in a leading Massachusetts case:[30] "The ground on which the rule rests is, that money, paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it, consistently with a true application of the facts to the legal rights of the parties. The cause of the mistake, therefore, is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made." On the other hand, the mere fact that the defendant has changed his position after the payment was made will not disentitle the plaintiff to a recovery; if on account of the receipt of money the defendant pays money to a third person or gives up a security, that is his misfortune.[31] Where, however, the plaintiff has alone been guilty of negligence and this negligence may fairly be said to have caused the defendant to change his position, recovery will be barred. Thus in a New York case[32] it was held that a plaintiff bank, whose negligent certification and payment of a raised draft had induced the defendant bank with whom the draft had been deposited to pay out money to the depositor, could not recover the amount so

[30] Appleton Bank v. McGilvray, 4 Gray 518 (Mass.).

[31] Kingston Bank v. Eltinge, 40 N. Y. 391.

[32] Continental Nat. Bank v. Tradesmen's Bank, 173 N. Y. 272, 65 N. E. 1108.

paid. But it seems that the change of defendant's position must be irrevocable. Thus where the defendant had as a result of the plaintiff's mistaken payment discharged certain sureties, this was held to be no defense, since by a proceeding in equity the discharge could be set aside and the sureties compelled to reimburse the defendant.[33]

B. Particular Applications.

59. **Gift bestowed under mistake.**—In the ordinary case of benefit conferred under mistake for which recovery is allowed, the plaintiff is able to show that he conferred the benefit under the belief that he was receiving a substantial equivalent in exchange, either tangible property or a legal right or the extinction of a legal obligation. This failure to receive an equivalent argues strongly for the plaintiff's recovery; but is it essential to his recovery? Suppose he has made a gift when actuated by a motive which could not have existed had he known the facts, and that he subsequently learns the facts. Very likely he is disappointed and does not experience the mental satisfaction which would otherwise be his; but the fact remains that he intended to make a gift. In a leading case[34] in which the plaintiff sought to recover for legal services originally intended by him to be gratuitous the court said: "The simple fact that services are rendered does not raise a liability on the part of the person for whom they are rendered, even though done at his

[33] Lawrence v. American Nat. Bank, 54 N. Y. 432.

[34] Cicotte v. Church of St. Anne, 60 Mich. 552, 27 N. W. 682.

request, if the circumstances are such as to rebut the inference that compensation is to be made." Accordingly no recovery can be had for goods supplied by way of charity to one supposed to be in need but who is in fact in comfortable circumstances;[35] or for services rendered without an intention to charge for them but with a secret hope that the recipient will make a substantial gift in return or perhaps remember the donor in his will, although it turns out that such hope was without foundation;[36] or for services beneficial to the defendant but rendered with the intention of charging not him but a third person to whom such services have also been of benefit.[37]

60. **Incidental benefits.**—Suppose that the plaintiff has primarily intended to benefit himself and that he has done so, but that in benefiting himself he has incidentally benefited the defendant. Can he recover for the benefit thus conferred? It is clear that the defendant has been benefited at the plaintiff's expense, but inasmuch as the plaintiff has already obtained the benefit he expected he cannot be said to have failed to receive an equivalent, and this defeats his recovery. Thus it was held in a Maine case[38] that a plaintiff, who in pumping water out of his own quarry had incidentally freed his neighbor's quarry from an accumulation of water, could not recover for the benefit so bestowed. Similarly it was held by the United States Supreme

[35] St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86.
[36] Osborn v. Governors of Guy's Hospital, 2 Strange 728 (Eng.).
[37] Coleman v. United States, 152 U. S. 96, 14 S. Ct. 473.
[38] Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65.

Court that where the federal government had built a railroad bridge on the line of the defendant company's road for the purpose of transporting troops in time of war the government could not afterwards recover from the company for the valuable bridge thus added to the company's property.[39]

61. **Mistake as to formation of contract.**—It not infrequently happens that a benefit is conferred in reliance upon a right supposed to be secured by a contract when in fact, owing to the failure of the parties to make a binding contract, no such right is in existence. Of course if the mistake as to the existence of the contract right is caused by ignorance of the legal requirements of a binding contract no recovery in quasi-contract will be allowed; but very often the mistake is essentially one of fact. Suppose, for example, that one party has made an offer that is obviously capable of two different meanings, that he intended to convey one meaning, but that the other party understood it to have the other meaning and accepted it accordingly. Here the parties have failed to contract. If now one of them performs the contract as he understood it he cannot enforce his understanding against the other party; indeed, he has no contract right at all, for there is no contract. Yet the other party has benefited; he expected to pay for the benefit and pay for it was expected; may he keep the benefit without paying for it? The law's answer to this question is an emphatic negative.

62. **Same subject—Illustration.**—In a leading

[39] United States v. Pacific R. Co., 120 U. S. 227.

case[40] the facts were in substance as follows: the defendants wished to obtain a watchman for a mill which had been attached at their suit; they asked the sheriff to get a watchman for them; the sheriff asked the plaintiff how much he would charge for his services as watchman; the plaintiff answered, "one dollar and a half a day, and nights the same"; the sheriff understood him to say and mean one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a day of twelve hours, and the same for the night time, or three dollars for every twenty-four hours; the sheriff communicated the offer to the defendants in accordance with his understanding and they told him to accept it; the sheriff then gave the plaintiff the key to the mill and told him to go ahead. Now it is plain that the minds of the parties had not met and that there was therefore no contract. But it is equally plain that in all fairness the plaintiff should be paid for his work; not necessarily at the rate of three dollars per day, for that might mean injustice to the defendants, who thought they were getting the work at the rate of a dollar and a half; nor yet necessarily at the low rate which they understood they had agreed to pay, for that might mean injustice to him. The court reached the sensible conclusion that a reasonable compensation should be paid.

63. **Mistake as to subject matter of contract.**— The parties may, however, understand each other perfectly and their agreement may be couched in the most approved legal form; but if it provides

[40] Turner v. Webster, 24 Kan. 38.

for the sale of a cargo assumed to be on its way to port but in fact at the bottom of the sea, or for the sale of a horse assumed to be alive but in fact dead, or for the sale of land by metes and bounds when no such land is in existence, it is obvious that, unless the seller has guaranteed the existence of the property in question, his contract to sell cannot be enforced. If now the purchaser has paid money on account of such sale he cannot rely upon the contract to get his money back, for the contract does not provide for that contingency, and it is void besides. The law of quasi-contract comes to his rescue and grants him restitution.

This principle has been well brought out in a leading English case[41] in which the plaintiff sought to recover money paid on account of the purchase of an annuity payable during the lifetime of a third person. At the time the money was paid the third person was dead. Said Pollock, C. B.: "The question between the parties is this—whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he made a bad bargain. But if, on the contrary, the annuity has ceased to exist before his purchase, then he has got nothing for his purchase money, and is entitled to recover it back."

64. **Mistake as to title of vendor.**—Assuming that the mistake does not result from ignorance of law it might be supposed that a person who paid money

[41] Strickland v. Turner, 7 Exch. 208 (Eng.).

as a purchaser of either real or personal property ought to have a quasi-contractual right to have his money back if his vendor turns out to have had no title. But such cases have generally been dealt with by the law of contract in such a way that no room is left for quasi-contract. The seller of goods is generally regarded as warranting the title impliedly even though he does not do so expressly.[42] Accordingly, if the title proves bad, he is liable in damages for breach of contract and no quasi-contractual remedy is needed by the vendee. The vendor of land, on the other hand, may or may not warrant the title. As is well known, his conveyance may contain a warranty of title for breach of which he will be liable or it may be in the nature of a quitclaim which, of course, contains no warranty. His contract to sell and convey at a later date will, however, be regarded as a contract to convey a good title, so that if he fails to make such a conveyance an action on the contract may be maintained.[43] As a general rule it may be said that the vendee's remedy in case of mistake as to the vendor's title must be sought in the law of contract.

65. **Improvements upon real property.**—It often happens that a man in possession of land places improvements upon it in the belief that the land belongs to him when in fact the title is in another. By the common law such improvements become a part of the realty when they are permanently annexed to it. Accordingly if the true owner brings

[42] Williston, Sales, §§ 216-220.

[43] Moore v. Williams, 115 N. Y. 586, 22 N. E. 233.

an action at law for the recovery of possession he will get the improvements along with the land. If the improvements were placed on the land in good faith it seems unjust that the owner should profit by the mistake at the expense of the party who placed them there. On the other hand the owner did not request that the improvements be made and he might be financially embarrassed by having to pay for them; so the case is not free from difficulty. Something like a quasi-contractual right seems to be indirectly recognized in equity; for it is generally held that where the true owner is compelled to resort to an equity court before obtaining possession of his land he will be granted relief only upon condition that he pay for improvements so made.[44] This upon the principle that he who seeks equity must do equity.

Suppose, however, that the owner gets possession by an action at law; can he be compelled to pay for the improvements? Judge Story held that the party who in good faith placed them there might maintain a bill in equity for their reasonable value;[45] but his view has not been generally followed. If such a bill could be maintained it would seem that the law courts ought to allow a quasi-contractual action of assumpsit for the same purpose; but they are unwilling to go so far.[46] The law courts have apparently followed the lead of equity to this extent: if the true owner is not content with getting posses-

[44] Putnam v. Ritchie, 6 Paige 390 (N. Y.).
[45] Bright v. Boyd, 1 Story 478 (U. S. C. C.).
[46] Mathews v. Davis, 6 Humph. 324 (Tenn.).

sion but sues for the profits of the innocent trespasser as well he can recover only the amount by which the profits exceed the value of the improvements.[47] In this state of the law it is not surprising that the whole matter of compensation for improvements made by persons in possession under an honest mistake as to title has in many jurisdictions been largely regulated by statute.

[47] Jackson v. Loomis, 4 Cowen 168 (N. Y.).

CHAPTER VII.

RECOVERY FOR BENEFITS CONFERRED UNDER CONTRACTUAL AGREEMENT.

66. **In general.**—Very often it happens that without any mistake as to each other's meaning parties reach an agreement intended by them to constitute a contract in regard to a subject matter as to the nature and existence of which each is fully advised; that in reliance upon the right created or supposed to be created by this agreement a benefit is conferred by one of these parties upon another; and yet that the contract is void or unenforcible in its inception or later becomes unenforcible owing to supervening occurrences, so that the contract remedy relied upon becomes unavailable. Thus the contract may be void for illegality or unenforcible because of the Statute of Frauds or the contract remedy may become unavailable because of the plaintiff's failure to perform a condition precedent. In all of these cases the question will naturally arise as to whether the party conferring the benefit has any remedy. Since he can have no action in contract it is plain that his remedy at law, if any exists, must be quasi-contractual. It is obvious too that a question might arise as to whether one who has a remedy in contract might sue in quasi-contract after the analogy of "waiving the tort and suing in assumpsit."

67. **Contract void for illegality.**—It is plain that

a benefit could not ordinarily be conferred in actual reliance upon an illegal contract except by one laboring under a mistake as to what constitutes a legal contract. It would seem then that recovery in quasi-contract for a benefit so conferred might be denied upon the simple ground that there can be no recovery for a benefit conferred under a mistake of law; but, oddly enough, such a recovery has been seldom denied on that ground. Actuated by considerations of policy based upon the desirability of discouraging illegal transactions, the courts have laid down the general rule that no recovery may be had for a benefit conferred under an illegal contract. Accordingly there can be no recovery for money paid for the rent of a house for gambling purposes,[48] for money paid to secure police protection for violations of law,[49] or for property transferred in fraud of creditors.[50] Wherever, as in these instances, the contract is *malum in se* (wrong in itself) this rule is of very general application, but where the contract is merely *malum prohibitum* the rule is subject to exceptions.

68. **Same subject—Plaintiff not in pari delicto.** —When the contract is not wrongful or immoral in itself and is only illegal because the legislature has made it so as a matter of policy, it is, as was said in a Massachusetts case,[51] "not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." An

[48] Boddie v. Brewer & Hoffman Brewing Co., 204 Ill. 352, 68 N. E. 394.
[49] Walhier v. Weber, 142 Mich. 322, 105 N. W. 772.
[50] Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13.
[51] Lowell v. Boston & Lowell Railroad Corporation, 23 Pick. 24 (Mass.).

instance of a contract of this latter sort is one made in violation of a law that has been made for the protection of persons in the situation of the plaintiff. Such a law is a statute forbidding the taking of usurious interest. Of such statutes Lord Mansfield said in Browning v. Morris:[52] "These statutes were made to protect needy and necessitous persons from the oppression of *usurers* and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and, with their eyes open, not only break the law but complete their ruin. Therefore the party injured may bring an action for the excess of interest." By a similar process of reasoning the same great judge allowed a woman who had been compelled to pay a sum of money to secure the consent of a creditor to her brother's discharge in bankruptcy, to recover it back as money paid under compulsion. In answer to the contention that the money was paid under an illegal contract he said: "If the act is in itself immoral, or in violation of the general laws of public policy, then the party paying shall not have his action; * * * but there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover."[53]

[52] 2 Cowper 790 (Eng.).

[53] Smith v. Bromley, 2 Douglass 696 (Eng.); Compare White v. The Franklin Bank, 22 Pick. 181 (Mass.), LEADING ILLUSTRATIVE CASES.

69. **Same subject—Other exceptions.**—Sometimes the plaintiff contracts in total ignorance of the fact which makes his contract illegal. In such a case it is plain that no useful purpose could be served by permitting the defendant to set up the defense of illegality in a quasi-contractual action. It will be perceived that this is in reality a case of mistake of fact and it is not surprising that a recovery is allowed. Accordingly a plaintiff, who paid money as a premium on an illegal insurance policy in ignorance of the fact that made the policy illegal, was allowed to recover the money so paid.[54] Again it sometimes happens that, although the plaintiff has paid money or transferred property in performance of an illegal contract with full knowledge of the facts that made it illegal and although his conduct was in the first instance quite as culpable as the defendant's, the plaintiff repudiates the transaction before the illegal purpose of the contract has been accomplished. In such a case many courts have thought it wise to permit a recovery in order to encourage the repudiation of such contracts. Thus in a California case[55] a plaintiff was permitted to recover the value of stocks that had been delivered to the defendant to be used for the purpose of bribing government officials in obtaining commercial concessions in Alaska, where it appeared that the plaintiff repudiated the transaction before any of the stocks had been used for that purpose. It will be noted that this exception extends to the case of a contract *malum in se*

[54] Hentig v. Staniforth, 5 Maule & Sel. 122 (Eng.).
[55] Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566.

as well as to that of a contract *malum prohibitum*. There is vigorous dissent to the recognition of this exception, especially where, as in the case just cited, the contract is *malum in se*.[56] And even in those jurisdictions which enforce the exception, its application is strictly limited to those cases in which no part of the illegal purpose has been accomplished.[57]

70. **Contract unenforcible on account of Statute of Frauds—Defendant in default.**—Suppose that the plaintiff has fully performed his part of the contract but that the defendant refuses to perform and assigns the Statute of Frauds as a reason for his refusal, or suppose that the plaintiff has partly performed and that the defendant repudiates the contract on that ground. In such a case it is plain that the defendant has obtained a benefit at the plaintiff's expense and that the benefit was one which he requested. His retention of the benefit without compensating the plaintiff is obviously unjust. And yet, if the contract be within the Statute, it is clear that the defendant has a perfect defense to an action on the contract, if he chooses to avail himself of it, and, in view of his refusal to perform his agreement, it may be safely assumed that an attempt to sue in contract would be frustrated by the setting up of this defense. If the plaintiff has a remedy at law it must, therefore, be sought in quasi-contract. Justice is clearly on his side and the only possible objection to the quasi-contractual action is that the plaintiff appears to be trying to prove a contract by

[56] Knowlton v. Congress & Empire Spring Co., 57 N. Y. 518.
[57] Ullman v. St. Louis Fair Assn., 167 Mo. 273, 66 S. W. 949.

oral evidence which must be proved by a writing if at all; but the sufficient answer is that he is not trying to prove the contract as a basis of recovery but only to show the circumstances which make the defendant's retention of the benefit inequitable. These circumstances include the making of an unenforcible contract. Accordingly recovery is very generally allowed whether the benefit be in the form of money, goods, land, or services.[58]

71. **Same subject—Plaintiff in default.**—Suppose that the plaintiff has entered upon the performance of a contract that is within the Statute of Frauds and that he has done work or paid money or transferred property in part performance; that the defendant wishes him to go on with the contract and is ready and willing to perform his part of it when the time comes; but that the plaintiff becomes dissatisfied and decides to stop performance. Has the plaintiff any rights in such a case? It is plain that he has none on the contract and that if he can recover in quasi-contract it must be on the ground that it would be inequitable to permit the defendant to retain the benefit without making compensation. But it is difficult to see how the plaintiff can justly complain of the inequities of a situation created and maintained by his own refusal to carry out his agreement. Accordingly it is generally held that no recovery can he had in such a case.[59] But some courts do recognize the plaintiff's right to stop performance

[58] Woodward, Quasi-Contracts, § 95 and cases cited; Dix v. Marcy, 116 Mass. 416, LEADING ILLUSTRATIVE CASES.

[59] Collier v. Coates, 17 Barbour 471 (N. Y.), LEADING ILLUSTRATIVE CASES.

and avail himself of a quasi-contractual remedy for what he has done.[60] This is especially true in those jurisdictions in which it is held that the Statute of Frauds makes a contract that does not comply with its requirements absolutely null and void instead of merely unenforcible as is held to be its effect in other jurisdictions;[61] although the plaintiff's equities would seem to be as strong in the one case as in the other. These equities must be found, if at all, in the consideration that the plaintiff would have no remedy on the contract if the defendant should finally change his mind and refuse to perform his part, a contingency as apt to occur where the contract is merely unenforcible as where it is altogether void.

72. **Same subject—Recovery for improvements on land.**—A party to a contract that is unenforcible on account of the Statute of Frauds may have done acts in reliance upon the contract that were not required by the contract and cannot, therefore, be deemed to have been done in performance of it. These acts may have involved the conferring of a benefit upon the other contracting party. In such a case the question will naturally arise as to whether a recovery may be had for the benefit so conferred. The most notable instance of such a benefit is an improvement placed on land by a party in possession under an oral contract of purchase. Suppose that after he has made such an improvement his vendor decides not to carry out his contract and brings an action for the possession of the land. Whatever be

[60] King v. Welcome, 5 Gray 41 (Mass.).

[61] Nelson v. Shelby Mfg. & Imp. Co., 96 Ala. 515, 11 So. 695.

the purchaser's rights in equity, he has no defense in the possessory action at law. May he recover for his improvements in quasi-contract? His equities are much stronger than those of one who has made an improvement under a mere mistake as to his own title; for in this case the purchaser has reasonably relied upon the apparent good faith of the vendor in agreeing to convey. However, the question is here complicated by the consideration that in most jurisdictions the purchaser of land under an oral contract who has made improvements may enforce specific performance in a court of equity, so that he does not really need the quasi-contractual remedy. In other jurisdictions it seems that compensation for the improvements may be enforced upon the principle of unjust enrichment, at least in courts of equity.[62] Of course if it is the purchaser himself that is in default his equities are exceedingly weak and a recovery is generally denied.[63] Similar considerations apply to improvements made by a tenant under a lease that is unenforcible on account of the Statute of Frauds.

73. **Contract unenforcible on account of impossibility—Plaintiff's performance impossible.**—In a very limited class of cases a contract that is valid and binding at its inception becomes unenforcible on account of a supervening impossibility of performance. Of course, a party might, by contract, undertake to perform absolutely and at all events, in which case he would be liable as upon an insurance

[62] Albea v. Griffin, 2 Dev. & Bat. Eq. 9 (N. C.).
[63] Long v. Finger, 74 N. C. 502.

contract, but in the absence of such a special undertaking his performance would be excused by such impossibility. That is to say, he would have a perfect defense to any action that might be brought against him upon the contract. Suppose, for example, that A agrees to keep B's books for a month, but that after working two weeks he has a stroke of writer's paralysis and is unable to keep books any longer. Or, suppose that A agrees to repair B's house, that he begins work, but that before the work is completed the house burns down. It is clear that B could not recover for A's failure to complete performance in either case.

On the other hand, if B had not agreed to pay A until he had worked a full month, or until the repairs on the house were fully completed, A could not, in accordance with the rules of strict contract law, recover upon the contract itself for his part performance, for he has failed to perform the condition precedent to B's liability. But is it right that he should go entirely without pay for what he has done? If B has had the benefit of A's services as a bookkeeper for two weeks it seems clear that he ought to pay the reasonable value of those services. Accordingly, the American courts usually allow a recovery in quasi-contract in such a case.[64] If, on the other hand, B's house was burned down before the repairs were completed B's benefit from A's labor is not so clear, for he appears to have had little or no opportunity for enjoying its fruits. Still, A's labor was actually put into repairs that presumably

[64] Wolfe v. Howes, 20 N. Y. 197.

increased the value of B's house while it stood, and it is scarcely fair to expect A to stand in the relation of an insurer of B's house. Accordingly, the courts in this country generally allow a recovery in quasi-contract for a part performance of a contract of repairs on a building that is destroyed before the repairs can be completed in accordance with the contract.[65] In England the courts are inclined to deny a recovery in both types of cases.[66]

74. **Same subject—Defendant's performance impossible.**—Continuing the illustrations of the preceding section, suppose that B, after hiring A to keep his books for a month, or to repair his house, has fully paid him in advance, but that, as before, A is prevented by illness from keeping B's books or by the burning of the house from completing the repairs. What are B's rights against A? Clearly he cannot maintain an action upon the contract itself, for A's failure to complete performance is excused. On the other hand, it is equally clear that he ought not, in any form of action, to recover all that he has paid A, for he has had the benefit of a partial performance. But in the absence of insurmountable difficulties in the way of estimating the value of the partial performance, it would seem that he ought to be able to recover what he has paid, subject to a fair deduction for what he has received. However, the English courts generally deny a recovery in such a case and the American courts are not in ac-

[65] Angus v. Scully, 176 Mass. 357, 57 N. E. 674; Butterfield v. Byron, 153 Mass. 517, LEADING ILLUSTRATIVE CASES.

[66] Cutter v. Powell, 6 Term Reports 320 (Eng.); Anglo-Egyptian Navigation Co. v. Rennie, L. R., 10 C. P. 271 (Eng.).

cord upon the subject. Even where the defendant has completely failed to perform his part of the contract and the plaintiff has accordingly had no benefit whatever to offset his own performance, the English courts are disposed to deny a recovery,[67] although a recovery is generally allowed in such a case by the courts of this country.[68]

75. **Contract unenforcible on account of plaintiff's breach.**—In the cases heretofore considered in which recovery was sought in quasi-contract for a benefit conferred under a contractual agreement, the plaintiff was without a remedy in contract on account of a rule of law the operation of which he could do nothing to prevent, the contract being either void or unenforcible at the outset or having become unenforcible on account of supervening impossibility. We now come to a class of cases in which the plaintiff has in legal contemplation brought upon himself the operation of a rule of law that prevents a recovery upon his contract for anything done by him in reliance upon its provisions. He has done this by inexcusably failing to perform his own agreement. If the damage done by his failure to complete performance exceeds the benefit conferred by his part performance the other party may recover that difference as actual damages in an action upon the contract; but very frequently, as in the breach of a labor or building contract, the benefit conferred will far outweigh the damage done. Granting that the

[67] Chandler v. Webster, (1904) 1 K. B. 493 (Eng.).

[68] Hudson v. Hudson, 87 Ga. 678, 13 S. E. 583; Butterfield v. Byron, 153 Mass. 517, LEADING ILLUSTRATIVE CASES.

ing its value as found by a jury when he is ready and willing to pay for the benefit in accordance with the terms of the contract under which the benefit was received. This is especially clear where the plaintiff has wilfully abandoned his contract. Where, however, plaintiff's abandonment has not been in wilful disregard of the defendant's rights and yet must be deemed inexcusable owing to the narrowness of the law's definition of legal impossibility, as, for example, where the plaintiff has unexpectedly been unable to secure necessary labor or materials, the hardship of the plaintiff's position may be so great as to justify an exception in his favor. Accordingly, some courts distinguish his case from that of a contractor in wilful default and allow a recovery.[71]

78. **Quasi-contractual remedy for breach of contract.**—Suppose that the plaintiff has agreed to build a house for the defendant for the sum of $5000; that he builds the house as agreed, but that upon its completion the defendant refuses to pay the agreed price. The plaintiff may, of course, sue upon the express contract and recover as damages the specified sum. But if he prefers he may treat the amount due as a simple contract debt, which it really is, and recover upon that theory in the action of indebitatus assumpsit.[72] In that case he is plainly availing himself of a mere alternative remedy for a breach of contract, for he recovers what the defendant agreed to pay. But may he also take the position that, as the defendant has refused to pay what he agreed, he must

[71] Steeples v. Newton, 7 Ore. 110.

[72] Chesapeake & Ohio Canal Co. v. Knapp, 9 Peters 541 (U. S.).

pay the reasonable value of what the plaintiff has done upon the theory of an unjust enrichment? Apparently impressed by the adequacy of the contract remedy, which, if enforced, will give the plaintiff the value which he himself placed upon his performance at the time of making the contract, the courts generally deny him the right to sue in quasi-contract for the value of the benefit.[73]

Suppose, however, that the plaintiff's performance is not complete, that the building is only partially erected, but that the defendant has made it impossible for the plaintiff to complete the building, or has told him that he would not pay for it when completed. In this case of repudiation after partial performance the plaintiff may treat the contract as though it had never been made and sue for the value of what he has done upon a count for work, labor, and materials.[74]

In England it seems that the plaintiff may resort to the quasi-contractual action only in case of actual repudiation in course of performance;[75] but in this country such repudiation appears to be unnecessary—a substantial breach by the defendant is enough.[76]

79. **Same subject—Restoration of benefit as condition of recovery.**—The plaintiff's right to disregard the contract and sue in quasi-contract is everywhere subject to the limitation that if he has received anything of value, other than money, under the con-

[73] Porter v. Dunn, 61 Hun 310 (N. Y.).

[74] Derby v. Johnson, 21 Vt. 17.

[75] Ehrensperger v. Anderson, 3 Exch. 148 (Eng.).

[76] Williston, Wald's Pollock on Contracts, p. 432, note.

tract, he must, if possible, restore it or at least offer to do so before commencing his action.[77] When money has been received such restoration could serve no useful purpose, since justice can be done by the simple process of subtracting the money received from the money value of the benefit conferred.[78] Even where the benefit received by the plaintiff is in some form other than money, e. g., goods or services, it would seem that justice might also be done by subtracting the value of the benefit received by the plaintiff from that of the benefit conferred by him, especially where it is impossible for the plaintiff to restore what he has received.[79] Accordingly, some American jurisdictions dispense with the necessity of tender when restoration is impossible.[80] The English courts take a narrower view and hold that the plaintiff's inability to restore the status quo is fatal to his quasi-contractual action.[81]

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[77] Miner v. Bradley, 22 Pick. 457 (Mass.).
[78] Clark v. Manchester, 51 N. H. 594.
[79] Keener, Quasi-Contracts, p. 305.
[80] Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.
[81] Hunt v. Silk, 5 East 449 (Eng.).

LAW OF ESTOPPEL

BY

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INTRODUCTION.

1. **Definition of estoppel.**—Estoppel is a bar which precludes a person from asserting or denying a fact. Such a bar may be asserted against one who attacks the accuracy of a record, legislative or judicial, or who denies a fact determined and adjudged in a judicial inquiry; or against one who denies a fact previously agreed to or represented by him to be true. The assertion of the bar is permitted upon the theory that, under the circumstances where it is permitted to be asserted, it is better that that which appears or has been stated to be true should stand as true rather than that its truth should be inquired into and perhaps disproven.

Estoppel was divided by Lord Coke[1] into (1) Estoppel by record; (2) Estoppel by writing (or deed); and (3) Estoppel in pais. The same subdivisions are adopted by Bigelow in his work on Estoppel.[2] But the subdivision, Estoppel in pais, has been divided by him into (1) Estoppel by con-

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1 Coke's Littleton, p. 352 (a).

2 Bigelow, Estoppel (5th ed.).

tract, and (2) Estoppel by conduct. These subdivisions have not seemed entirely suitable and, in their stead, the following subdivisions are used in this article: (1) Estoppel by record, (2) Estoppel by deed, (3) Estoppel by contract, (4) Estoppel by misrepresentation, (5) Quasi-estoppel.

Since estoppel by conduct includes estoppel by misrepresentation, it will be seen that Mr. Bigelow's classification makes estoppel in pais include estoppel by contract and estoppel by misrepresentation. It will be shown that estoppel by deed and estoppel by contract are much more nearly alike than estoppel by contract and estoppel by misrepresentation. In fact, estoppel by deed and estoppel by contract might well be treated together, except for the fact that estoppel by deed had a distinct historical development which seems to make a separate treatment desirable. The heading, quasi-estoppel, is intended to cover a class of cases which are generally treated under the heading estoppel, but which do not fall within any of the generally recognized subheads of the subject.

CHAPTER I.

ESTOPPEL BY RECORD.

2. **Estoppel by judgment.**—The estoppel arising from a judgment has two aspects; or rather, two different kinds of estoppel may arise from a judgment. One of these results from the effect given to the enrollment of the judgment as a matter of public record; the other from the effect given to the judgment as a declaration of rights and duties.

3. **Judgment as a record.**—The records of a court of justice are conclusive of the facts recited therein. No one, whether a party to the proceeding or not, may, in any other proceeding of any nature whatever, except one brought to correct or annul the original proceeding, impeach the latter by introducing evidence to show its inaccuracy.

Thus it is held conclusive against the whole world that the facts narrated in the record occurred; that they occurred at the time when they purport to have taken place; that the parties named as litigants participated in the cause; and that the judgment was given as stated. But, as indicated, an action may be brought to correct or annul a record in the same manner and for the same reasons that an action may be brought to correct or annul other instruments.

4. **Judgment as res judicata.**—It is a fundamental rule concerning judgments that a determination of any matter by a court of competent jurisdiction is

conclusive as to the law and facts found and adjudged between the parties to the litigation and their privies. That this is fundamental will be recognized when it is considered that the aim and object of judicial proceeding is to end disputes. There would be no end to litigation if the same issue might be litigated by the same parties an indefinite number of times.

5. **Final judgment.**—In order that a judicial determination should have this effect there must be a judgment rendered. A verdict rendered or finding made, not followed by judgment, is not conclusive. Not only this, the judgment or decree must be final. An interlocutory judgment or decree will not support the plea of res judicata. It follows, that the fact that an action is pending is no bar to a second action between the same parties on the same issue, though it may be ground for a plea in abatement.

Moreover, the judgment must have been rendered on the merits of the case. A judgment dismissing an action because of the legal insufficiency of the complaint, or because of the insufficiency of the evidence produced by the plaintiff, does not constitute a bar to another action upon the same demand. But though a judgment not rendered upon the very case presented by the plaintiff will not be a bar to an action by him upon the same claim or demand, it will operate as a bar with respect to all matters actually determined. Thus, when a suit had been dismissed for want of jurisdiction and no other suit was begun before the expiration of the Statute of Limitations, the plaintiff was held estopped in a suit

begun after such time to allege that he had begun suit within the proper time.[3]

6. **Identity of cause in issue.**—In order that a judgment may support the plea of res judicata in a subsequent action between the same parties it is necessary that there be an identity between the causes of action presented in the two cases. In the determination of the question whether two causes of action in different suits are identical or not, it is not necessarily conclusive against their identity that the form of action in the two suits is different or that precisely the same remedy is not sought in the two cases. Thus it has been held that a judgment for the defendant in an action for false representation of a certain fact is a bar to an action for warranty of the same fact.[4]

But if the cause of action in two suits was identical the judgment in the first is conclusive, even though the facts were incorrectly determined in it or the law was incorrectly applied to the facts determined. Thus it was decided in the famous case of Marriot v. Hampton[5] that where money had been paid under a judgment it could not be recovered in an action for that purpose upon the finding of a lost receipt showing that the money paid under the judgment had been paid before the action in which the judgment was recovered had been commenced.

7. **Identity of point in issue.**—A judgment, moreover, operates as an estoppel with respect not only

[3] Gray v. Hodge, 50 Ga. 262.
[4] Norton v. Doherty, 3 Gray 372 (Mass.).
[5] 7 T. R. 269 (Eng.).

to the cause of the action, but also with respect to all facts determined by the finding or verdict upon which the judgment was rendered. It is immaterial that the cause of action in the second case is different from that in the first, the facts determined in the first are conclusive evidence in the second, where the same point is brought directly in issue. Thus where one of two notes, given at the same time upon the same consideration, was sued upon and in the action it was held that the sale in consideration of which the note was given was induced by fraud, this determination of the question of fraud was held conclusive in a suit upon the second note.[6]

While a finding or verdict is conclusive of the facts found, and while the application of the law to the facts so found is equally conclusive, the rules of law laid down in one case cannot be held conclusive in other actions between the same parties as applied to other facts.

The erroneous application of the law in one action does not bind the parties to a rule of law different from that which applies to the general public.

8. **Parties.**—The estoppel of a judgment is limited, ordinarily, to the parties and privies to the action. Parties are those who have or assume the right to take part in the controversy and in any way control the proceedings. It is necessary that the bar of an estoppel be mutual; hence if only one of the parties in subsequent litigation was engaged in

[6] Gardner v. Buckbee, 3 Cow. 120 (N. Y.). If the facts were determined by a jury in equity where the verdict was merely advisory, such verdict would probably be held to be not necessarily conclusive in a second action.

the prior litigation, the judgment there obtained is binding on neither. Thus it is well settled that a judgment against a defendant in a criminal case is not conclusive against him when sued in a civil court for damage caused by the act which constituted the offense. Also an acquittal will not estop one who seeks to hold the former defendant liable civilly. Thus an acquittal on a criminal charge will not estop one from proving the charge in an action for slander. The parties in the criminal and the civil case are not the same.

The judgment, however, binds not only the nominal parties but the real parties as well. Where an action was brought against a sheriff to recover a sum of money held by him for a third person, it was held that a judgment for the sheriff was conclusive in an action brought against such third person by the former plaintiff to recover the same sum.[7]

In fact, it has been held that where the real parties are not the same though the nominal parties are, such nominal parties are not bound. Moreover, a judgment concludes a party only in the capacity in which he sues. Thus, a judgment for or against an administrator or other representative in his representative capacity does not bind him in a suit in his proper person.

A question of some difficulty arises with respect to the effect of a judgment against an agent for an act committed by the agent in the course of his employment. It seems to be held that a judgment against either the agent or the principal is a bar

[7] Tate's Ex'rs v. Hunter, 3 Strob. Eq. 136 (S. C.).

to an action against the other. This is held, probably, on the ground that the plaintiff had made an election, rather than on strict grounds of estoppel. On the other hand, it is clear that a judgment obtained by or against an agent cannot be used by or against the principal.[8]

9. **Privies.**—Not only are parties bound by an adjudication but their privies also. Privies as used in this sense include those only who have a property interest in the subject matter of the prior litigation. Such interest may be obtained by succeeding to the rights of a party, or of parties to the prior litigation; or by holding in subordination to a party or parties to such litigation. Such interest must be one acquired after the beginning of action. Thus to take an illustration of privity by succession, the grantee of land is not affected by a judgment against his grantor obtained in an action with respect to such land begun after he obtained his grant, though he would have been bound had he obtained his grant after the action was begun.

The typical illustration of privity by subordination is the relationship of landlord and tenant.

It follows from what has been said that there is no such privity between an executor and an heir that a judgment against one binds property in the hands of the other, though a judgment against the testator will of course bind the personal property affected in the hands of the executor and a judgment against the ancestor will bind the real property affected in the hands of the heir.

[8] Bigelow, Estoppel (5th ed.), pp. 125-127.

10. **Jurisdiction.**—It has been seen that only parties and privies are bound by a judgment, from which it follows that strangers are not bound and may, when the judgment is strictly in personam, attack it in any other action, whatsoever its object may be. It remains to be noted that in certain exceptional cases the judgment may be attacked in collateral proceedings by the parties themselves and their privies. These exceptional cases all rest on one of two grounds, (1) absence of jurisdiction, or (2) fraud in procuring the judgment.

In case a judgment is attacked for lack of jurisdiction the following rules prevail. With respect to residents there is a conclusive presumption in favor of the judgments of superior courts, in absence of anything in the records showing lack of jurisdiction.

In the case of inferior courts there is no such presumption in favor of jurisdiction, and the judgment may be attacked in collateral actions by the parties themselves, unless all the facts necessary to give jurisdiction are spread upon the records. But where the record of an inferior court recites the necessary jurisdictional facts, such recital is probably conclusive in the courts of the same state.[9]

Even when the record fails to show jurisdictional facts it has been held that an adjudication of the question of jurisdiction by the court trying the case is conclusive of the question of jurisdiction.

11. **Fraud.**—It is a well recognized rule that equity will entertain an action to set aside a judgment which has been obtained by fraud. The rule

[9] But see Ferguson v. Crawford, 70 N. Y. 253.

has a well recognized exception, however, that seems quite clearly established. This is, that equity will not set aside the decree of a probate court admitting a will to probate, on the ground that such probate was obtained by fraud. The reason for the exception is not entirely clear, but it seems to be held to result in some way from the exclusive jurisdiction which probate courts have over the probating of wills.[10]

Equity will, however, compel a fraudulent devisee or legatee to hold in trust for him who would have received the property devised or bequeathed but for such fraud.

Whether a judgment may be attacked by the parties in a collateral proceeding has, however, been the subject of conflicting opinion. But it has been held in several cases that this may be done.[11]

The fraud for which a judgment may be attacked as stated is limited strictly to fraud in obtaining the judgment itself. A judgment may not be so attacked because obtained on a purely fictitious claim, nor because the testimony in the action was false. The kind of fraud meant is such as would exist in case a judgment was entered against one through the treachery of his counsel, or where one was induced to permit the entry of a judgment by fraudulent representations made to him. But even when it is conceded that judgments may be collaterally attacked it may be well that such impeachment should not be permitted except where, through no fault of the

[10] See Holden v. Meadows, 31 Wis. 284.

[11] Hall v. Hamlin, 2 Watts 354 (Pa.); State v. Little, 1 N. H. 257.

party injured, a direct attack upon the judgment is impossible. An exception to this limitation should probably be permitted in the case of fraud touching the jurisdiction of the court.[12]

12. **Judgments in rem.**—In the preceding discussion it has been assumed that judgments are conclusive between parties and privies only. But there is an exceptional class of judgments by which all persons are bound. These are called judgments in rem. The grounds upon which such judgments are held to be conclusive upon every one seem to be either (1) that all persons were properly made parties, or (2) that the cause was tried between those who had the exclusive right to try it.[13]

So far as the first of these grounds is concerned it will be seen that it is but an application to an exceptional case of the principles already discussed.

The only case which seems to fill the requirements of a true judgment in rem seems to be the case of an adjudication of prize in admiralty. A striking illustration of the rule is found in the case of Hughes v. Cornelius.[14] The questions decided in this case arose with respect to a foreign judgment, but are equally applicable to a domestic judgment. The action was one of trover for a ship and goods. It was found by special verdict that the owner, master and nearly all of the crew of the ship were English; that the vessel was taken during a war between France and Holland and condemned as a Dutch prize in a French court

[12] Bigelow, Estoppel (5th ed.), pp. 217, 218.
[13] Bigelow, Estoppel (5th ed.), pp. 47, 224.
[14] 2 Show. K. B. 232 (Eng.).

of admiralty, and sold to the plaintiff Hughes under the sentence of such court, and that upon her arrival in England she was taken possession of by the defendants, servants of her former master, and converted to their own use. The court held that the sentence of condemnation was conclusive notwithstanding that the verdict falsified it with respect to the nationality of the vessel. It has also been declared that the judgment of a court of competent jurisdiction respecting the condemnation of goods seized by a customs officer is conclusive of the liability of the officer making the seizure.[15]

Decrees of divorce are conclusive against the whole world as to the status of the parties, but are not complete adjudications in rem, as they are not held to be binding so far as the findings upon which the judgment was based are concerned.[16]

Decrees of courts of probate also are held conclusive of the testamentary character of instruments and of title claimed from grants of letters of administration with a limitation similar to the foregoing with respect to the finding upon which the adjudication was based.

13. **Foreign judgments.**—In general there is little difference in respect to the effect given to a foreign judgment and a domestic judgment so far as the rule of res judicata is concerned, though judgments of foreign courts are not aided by the presumption of jurisdiction as are those of the local superior courts.

[15] Gelston v. Hoyt, 13 Johns. 561 (N. Y.); see also same case on appeal, 3 Wheat. 246 (U. S.).

[16] Hood v. Hood, 11 Allen 196, 110 Mass. 463; Gill v. Read, 5 R. I. 343.

This statement is subject to the important qualification that the judgments of foreign courts, though given full effect so far as the rules of res judicata are concerned, are not held to constitute record evidence when sued upon in a domestic tribunal. The effect of this involves a statement of the law of merger as applied to judgments. It is held by the law of merger that a security of a higher nature than the one existing, when taken for the same obligation, merges the existing security. A judgment, being the highest form of security, merges all existing securities.[17] Hence, no action may be maintained on them after the judgment is secured. But it is held that a foreign judgment does not constitute a record in the same sense that a domestic judgment does, so as to cause the original demand or existing securities to be merged in it. Hence, though a foreign judgment may be conclusive between the parties in the same way that a domestic judgment is, it does not prevent the bringing of an action on the same demand as a domestic judgment would.[18]

But the Constitution of the United States provides, with respect to the states of the Union: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proven and the effect thereof."[19] Under this provision Congress had enacted that "the

[17] Schuler v. Israel, 120 U. S. 506; King v. Hoare, 13 Mees. & W. 494 (Eng.).

[18] Smith v. Nicolls, 7 Scott 147 (Eng.).

[19] Art. IV, § 1.

said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law of usage in the courts of the state from whence the records are or shall be taken."[20] Under this and supplementary acts it has been held that the judgments of sister states are to be held as record evidence throughout the United States and that all existing securities are merged in a judgment of a sister state.[21]

[20] Act of May 26, 1790.

[21] Bank of the U. S. v. Merchants Bank of Baltimore, 7 Gill 415 (Md.).

CHAPTER II.

ESTOPPEL BY DEED.

14. **Basis of estoppel.**—Estoppel by deed may be defined as a bar to the denial by the parties to a sealed instrument of its force and effect according to its terms by means of any evidence of inferior solemnity.[22]

The nature and grounds of this estoppel are very different from those that exist in the case of estoppel by judgment. The basis of estoppel by deed seemed to lie originally in the peculiar solemnity attached to a sealed instrument. The view seemed to be held that when parties had taken the trouble to reduce their agreement to writing and attach a seal to such writing the proceedings were of such solemn character and, of necessity, exhibited so much care and foresight that no evidence outside of the instrument ought to be admitted to contradict its terms. But it is a recognized fact that the existence of a sealed instrument is no longer evidence of any considerable degree of care in its execution. Hence, emphasis is now laid upon the contractual nature of the instrument, and its binding effect is more and more placed, in the case of deeds, upon the same ground as in the case of simple contracts, i. e., the intention of the parties. So it may well be doubted whether the

[22] Bigelow, Estoppel (5th ed.), p. 332.

conclusiveness of sealed instruments depends to any considerable degree upon the existence of the seal and whether it differs to any considerable extent from the estoppel of the simple contract.[23]

15. **Parties and privies.**—As in estoppel by record, only parties and privies are bound by the estoppel of a deed. Also, they only can claim the advantage of it. Thus, it has been held that one is not estopped by a deed made by him reciting that he was not the exclusive owner of certain premises when sued by one who was a stranger to the deed and who knew nothing of its contents at the time of execution, for the possession of the land described in the deed.[24] But a person acting under the authority of a party to a deed cannot claim to be a stranger to it so as not to be bound by it.

A deed binds a party in the capacity in which he made it, only; hence a deed made by one as administrator does not bind him personally.[25] Nor is one bound as administrator by a deed made by him individually.[26]

A deed works an estoppel with respect to competent parties only. Hence, a married woman under disability is not estopped by her warranty. So far as her power to make a deed extends, however, she may be estopped. An infant also is not estopped by his deed, though he will be if he ratifies it after attaining his majority.

[23] Bigelow, Estoppel (5th ed.), p. 331, note 1.

[24] Sunderlin v. Struthers, 47 Pa. St. 411.

[25] Wright v. De Groff, 14 Mich. 164.

[26] Metters v. Brown, 1 Hurl. & C. 686 (Eng.). But it has been held that a guardian who sells realty with covenant of authority is estopped to claim the land himself.

Privity, as used in connection with estoppel by deed, means the holding in succession to, or in subordination to, another, who is, in turn, a party to the deed, or privy to one who is a party to the deed, upon which is founded the alleged estoppel. Thus, a tenant is bound in the same way that his landlord is. However, the grantee of the title of another is not estopped in an action by a third person to show that he holds another and better title to the same land from a different source. The claimant of title to land is entitled to reinforce his title if possible.

The grantee, even in a deed poll, is, however, bound by the covenants in the deed which are meant for him, if he accepts and acts under the deed.

16. **Extent of estoppel.**—A deed which is invalid produces no estoppel. Thus, under a statute providing that a deed of a certain character should be void unless registered, provided the land conveyed was not of a certain value, an action of ejectment was begun for land held under a non-registered deed. It was contended by the plaintiff that no registration was required, as the defendant had covenanted that the land was of greater value than the required value. The defendant offered to show that this was not true and the court admitted the evidence.[27]

The estoppel in a valid deed is limited to actions based upon the deed itself, or upon some right arising out of the deed. Even between the parties the estoppel is not binding in other matters. This seems to indicate clearly that the essence of the estoppel is found in the contract contained in the deed.

[27] Doe & Chandler v. Ford, 3 Ad. & E. 649 (Eng.).

The estoppel may be met by an estoppel contained in another deed, in which case the truth may be shown by other evidence. Also, the estoppel may be met by the existence of a representation which estops the maker of it from using the deed. Also, if in other parts of the deed the truth appears, misstatements contained in the deed raise no estoppel.

17. **Same subject—Continued.**—An estoppel by deed prevents the showing that a statement of fact contained in a deed is not true. It is hardly to be presumed that parties intended that to be taken as true which is not in fact true. Hence, the rule is laid down that recitals in a deed must, in order to create an estoppel, be specific. That is, a mere general statement is not, in general, sufficient to raise an estoppel. Thus, in an action upon a bond the condition of which was the payment of a yearly rent of £170 it was held that it could not be shown that the lease upon which the rent was due stated the annual rental as £140 and that that sum had always been paid;[28] while, on the other hand, a recital in the condition of a bond that a certain person had been duly nominated and appointed collector did not prevent the fact being shown that the appointment had not been so nearly completed that the person named was entitled to act as collector.[29]

A pointed illustration of the statement that the conclusiveness of an estoppel depends upon the intention of the parties is found in the rule that the recital of consideration in a deed may not be denied,

[28] Lanison v. Tremere, 1 Ad. & E. 792 (Eng.).
[29] Kepp v. Wiggett, 10 C. B. 35 (Eng.).

while the acknowledgment of the receipt of the consideration, it is generally held, may be.[30]

18. **Title by estoppel.**—One of the most striking results of the operation of an estoppel is found in the so-called "title by estoppel." It follows from what has been said in the preceding paragraphs that if the grantor of land by deed asserts in the deed a title which he has not, and assumes to convey it, he and his privies will be estopped to deny that he possessed such title. Hence, if he subsequently acquires it he will not be able to assert it against his grantee, who will, however, be able to assert it against him. It follows that, as between the parties, the acquisition by the grantor of a title results in the obtaining of the benefit of it by the grantee, though not necessarily in the latter's obtaining the title itself. All this is explainable under the general principles of the law of estoppel. But it is insisted, and has been held in many cases, that not only is the grantor estopped to assert his after-acquired title, but that such title actually passes to the grantee. This is the title that is meant by the phrase "title by estoppel" and it is the doctrine of "title by estoppel" that presents "the most striking and the most complicated doctrine in all the 'curious learning' of estoppel."[31]

19. **Effect of common law conveyances.**—To understand the doctrine of "title by estoppel" it is necessary to speak briefly of the nature and effect of several of the common law conveyances. It is said that four of the common law conveyances possessed

[30] McCrea v. Purmort, 16 Wend. 460 (N. Y.).
[31] Bigelow, Estoppel (5th ed.), p. 384.

the efficacy to pass an after-acquired estate. These were: the feoffment, the fine, the common recovery, and the lease.[32]

Just why the lease should be held to have this effect is not clear, but the situation with respect to the others is easier to comprehend. To understand it one must understand the nature of a feoffment. The fine was, in effect, the acknowledgment of a feoffment, and the common recovery the judicial declaration of it. The feoffment itself constituted the normal mode of transferring title to land in the early common law. It developed at a time when possession was more nearly equivalent to title than it now is. It consisted in the "livery of seisin," a phrase that is nearly synonymous with what would now be understood by "delivery of possession," by the grantor to the grantee. The existence of a deed was not necessary to the transfer, though frequently used to evidence the terms of the contract. The feoffment transferred the "seisin," or possession, to the feoffee. This was true even though the feoffor had entered wrongfully upon the land without right or title. When it is understood that he who had seisin of land was held to be the one who was bound by the feudal obligations, liable to render the feudal dues, and entitled to feudal protection, it will be seen that seisin was very nearly synonymous with title. The former owner who had lost the seisin had merely the right, with marked limitations, to recover seisin. This being true, it follows that in case that right came into the hands of the feoffer he might be estopped by his deed

[32] Bigelow, Estoppel (5th ed.), p. 385.

to assert it. The right being effectually barred, the feoffee would have an indisputable title to the land. Hence, the effect of the estoppel would be to render secure a title rather than to transfer one.

20. **Effect of common law warranty.**—The estoppel necessary to perfect the title gained by a wrongful possession was found at common law in the common law warranty. This was a covenant real which bound the warrantor and his heirs to defend the title of the warrantee, and, in case the latter was evicted under a paramount title, to give the feoffee land equal in value to that lost. This liability on the part of the feoffor and his heirs might be asserted against them by way of rebutter in case they or any of them came into possession of the paramount right. Even though they had no other land than that conveyed, they would be bound under the warranty to return it, for they would then be possessed of land which could be taken under the warranty. Hence, in order to avoid circuity of action, the feoffee was permitted to interpose as a defense to an action by the feoffor or his heirs the warranty of the feoffor.

21. **Effect of modern conveyances.**—But conveyances by deed alone, and under the Statute of Uses, have always been held to be "innocent conveyances," i. e., they have never been held to actually transfer a greater right than the grantor had at the time of the conveyance. Hence, if the effect of the estoppel produced by such a deed is to leave the grantee an actual title, such title must be actually transferred by the estoppel.

It is apparent that the question of the actual trans-

fer of the title by estoppel can only arise between the grantee and someone who cannot properly be held to be a party or privy to the deed. As between the grantor and the grantee it is immaterial whether the title actually passes or not. The nature of the estoppel by deed as between grantor and grantee will be considered first.

22. **Estoppel between grantor and grantee.**—It is laid down that, in general, no estoppel is produced by a quitclaim deed, while an estoppel is produced by a warranty deed. This might seem to indicate that it is the warranty that produces the estoppel, and that it is given this effect to prevent circuity of action; but it seems that the estoppel might better be attributed to the effect given to the contract of the parties. If they agree that the grantor has title, he cannot deny it. This has been held to be true even though no action could be had upon the covenant contained in the deed, as where it has been barred by the Statute of Limitations.[33] And it is not even necessary that there be covenants of title. If the deed recites title in the grantor he will be estopped to deny that he actually had it.[34] But a warranty without recital will operate to estop the grantor, as will the other covenants of title.

Whether or not a warranty will operate as an estoppel when the recital shows that there was no title in the grantor at the date of the deed, is not clear. There has been a conflict of opinion as to whether covenants of warranty estop the grantor in a quit-

[33] Rawle, Covenants (4th ed.), pp. 401-403.
[34] Bigelow, Estoppel (5th ed.), p. 396.

claim deed, such grantor not laying claim to any particular title.[35] The same difference would probably exist where there is a direct conflict between the recital and the warranty. But since the basis of estoppel by deed appears to be contract and not representation, it would seem that, if from the whole deed it appears to be the intent of the parties that the grantor should be treated as having title, even though the recitals in the deed showed that he did not have it in fact, he would be treated as so having it.[36]

23. **Between first and second grantee from same grantor.**—The question as to whether the estoppel is effective as between the grantee of one without title and a subsequent grantee without notice from the same grantor after he acquired title, is more difficult than that just discussed. The answer involves the discussion of the two following questions: first, does the relation of privity exist between the grantor and the second grantee, so that the second grantee is bound by the same estoppel as the grantor? second, if he is not, does title actually pass by the estoppel? In answer to the first question, it seems that there is no such privity between any grantor and his grantee as to bind the latter by the estoppel of the former. The grantee in fee expects to get a complete and independent title. His position is not that of subordination to anyone. As has been shown, he may even buy in an outstanding title and then deny, even against his grantor, the title of such grantor.

[35] Bigelow, Estoppel (5th ed.), pp. 402, 403.
[36] North v. Henneberry et al., 44 Wis. 306.

Hence, it would seem that there is no such privity between grantor and grantee as to bind the grantee when a stranger would not be bound.

But a stranger would not be bound unless the title actually passes by virtue of the estoppel. If estoppel has this effect, it must be conceded that it has a very remarkable effect. The better opinion seems to be that it does not have this effect.[37] Yet it has been held in a number of cases, and said in many, that title does pass by virtue of the estoppel. This holding seems to have been founded in the first instance upon the mistaken authority of the common law conveyances referred to before.[38]

But it seems that the doctrine, however mistaken it may have been in the first instance, is gaining ground. Nevertheless, it has been held, even between grantor and grantee, that where the grantee has been evicted before the grantor got title, he cannot be compelled to accept title in lieu of an action for breach of warranty.[39]

[37] 16 Cyc. 697.
[38] Bigelow, Estoppel (5th ed.), pp. 429, 430.
[39] 16 Cyc. 698.

CHAPTER III.

ESTOPPEL BY CONTRACT.

24. **Basis of estoppel.**—The doctrine of estoppel by contract has been stated as follows: "A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or by defendant or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties (it may be one, it may be all) pledging or justly assuming the fact in question will be estopped from taking any position to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the real terms of agreement."[40] From this it will be seen that the parties are bound by and because of their contract. It follows that the estoppel is effective only in case the contract is a legal contract. An illegal agreement being in fact no contract, is not binding even by estoppel. But, since the parties are bound by their contract, it is immaterial whether one or both know that the facts agreed to are not in fact true.

[40] Bigelow, Estoppel (5th ed.), p. 459.

25. **Distinguished from estoppel by deed.**—The distinction between estoppel by deed and estoppel by contract appears to be largely historical. So far as there is any distinction, in fact, at present, it rests upon the peculiar dignity attached to a seal. As shown in the chapter on estoppel by deed, that dignity has largely disappeared. There is, in consequence, but little distinction to be taken between estoppel by simple contract and by deed. Indeed, the distinction between sealed and other written instruments has in some states been expressly abolished by statutes, but it is very doubtful whether such statutes have materially affected the law of estoppel by deed.

26. **Estoppel of corporations.**—The estoppel may extend to the right to deny the character in which the contract was executed. Thus, one who contracts as an executor or as an agent will be estopped to deny that he was in fact such executor or such agent. This application of the doctrine is of great importance in the law of corporations in estopping an association which has dealt as a corporation to deny that it is a corporation. This estoppel occurs in the case of corporations which are outside the realm of de facto corporations.

A de facto corporation is created where there is an attempt in good faith to organize a corporation under a valid law, a colorable compliance with the law, and a user of the powers so assumed.[41] Where such a corporation exists it is held that only the state can object to the assumption of such powers

[41] Clark, Corporations, p. 78.

and all others are bound to recognize the existence of the association as a corporation independent of any question of estoppel. But where there is not even a de facto corporation an association which contracts as a corporation will be estopped to deny that it is a corporation.

27. **Same subject—Continued.**—Where an association which is not a de facto corporation is estopped to deny that it is a corporation, the estoppel is based ordinarily upon the same ground that the estoppel of an individual who has contracted in a certain capacity is based. That is, having contracted in a certain capacity, the association has implicitly agreed that it has that capacity and is not allowed to deny that it has it. Thus, it may be possible for a person who has made a contract with an association as a corporation to sue and hold it as such, when others who had not so dealt with it would be obliged to sue the members of the association as individuals.[42]

It has also been stated that those who deal with an association as a corporation, recognizing and treating it as such, are estopped to deny that it is in fact a corporation.[43] But it may well be doubted whether this may not better be attributed to that rule which prevents one party to a contract from denying the capacity of the other.[44]

The estoppel is limited to contracts such as are legal and such as a corporation might have been created and empowered to make.

[42] Clark, Corporations, pp. 96-99.

[43] Clark, Corporations, pp. 92-93. See subject, PRIVATE CORPORATIONS.

[44] Bigelow, Estoppel (5th ed.), p. 463.

28. **Negotiable instruments.**—The acceptor of a bill of exchange admits the existence and capacity of the drawer or payee; the drawer admits the existence and capacity of the payee, the maker of a promissory note admits the existence and capacity of the payee, and all persons negotiating negotiable instruments, with or without indorsement, admit the existence and capacity of all prior parties.[45] These admissions may be taken advantage of by the parties to whom the instrument is transferred. The conclusiveness of these admissions gives them the character of estoppels.

It appears that the indorsement of a negotiable instrument operates not only to prevent the indorser from denying the capacity of the prior parties in case the indorsee does not know of their incapacity, but even in case he does know of it. That is, the estoppel is based upon the agreement of the parties and not upon a representation.[46]

The estoppel of any party to a negotiable instrument goes, however, to the existing capacity of the other parties, and in case it is negotiated later by one of them, or in case an additional liability is assumed by one of them with respect to the instrument, the estoppel does not extend so far as to prevent the denial of his or their capacity. Thus, if the payee of a promissory note were to become insane after the execution of the note and were then to indorse it, which indorsement was later repudiated by him or his representatives, the maker of the note would not

[45] See subject, NEGOTIABLE INSTRUMENTS.
[46] Erwin v. Down, 15 N. Y. 575.

be estopped to deny the payee's capacity to indorse at the date of indorsement.[47]

29. **Same subject—Continued.**—The estoppel of a party to a negotiable instrument extends beyond the estoppel to deny the capacity of other parties. It extends in many cases to their signatures. Thus, the indorser of such an instrument cannot deny the signatures of any prior parties. The acceptor of a bill of exchange admits the genuineness of the signature of the drawer. This is illustrated by the leading case of Price v. Neal.[48] This was an action to recover from Neal the amount of two bills of which Price was the drawer. One of the bills had been accepted and the other had been paid without acceptance. Both had been forged. It was held that there could be no recovery. The rule is subject to the limitation that only those who receive the instrument after acceptance can take advantage of the estoppel, a distinction which, apparently, was not noticed in the case of Price v. Neal.[49]

The further limitation exists in favor of the acceptor that he is estopped as to the signature of the drawer only, and not as to the signatures of indorsers. This is true even where the indorsement is in the same hand as the signature of the drawer.[50] Nor is an acceptor estopped to deny that the instrument has been altered since issued and before acceptance. Thus, where plaintiffs sued to recover the amount paid by them upon a bill, the amount of which

[47] Bigelow, Estoppel (5th ed.), p. 437.
[48] 3 Burr. 1354 (Eng.).
[49] Bigelow, Estoppel (5th ed.), p. 491.
[50] Beeman v. Duck, 11 Mees. & W. 251 (Eng.).

had been raised and the name of the payee in which had been altered, it was held that they were entitled to recover.[51]

30. **Receipts.**—The rule that the conclusiveness of an estoppel depends upon the intention of the parties is nowhere better illustrated than in the case of the statement of a consideration in a contract and the acknowledgment of its receipt. It is ordinarily held that such allegations are not binding beyond the point where it was contemplated they should be deemed binding. A striking illustration is found in the case of deeds of real estate. In this case the courts have held that, though the parties are estopped to deny the consideration for the purpose of defeating the deed, they may show that it has not been paid as stated in the deed, or that an entirely different consideration from that stated was agreed to be given. Thus, where the deed stated the consideration to be money paid, evidence was permitted to show that the consideration, in reality, was not money, but iron.[52]

It has also been held with respect to the acknowledgment of receipt of goods in a bill of lading, and of the premium in an insurance policy, that such acknowledgments are not conclusive.[53]

The acknowledgment of receipt may, however, operate as an estoppel in favor of third persons who have relied upon the acknowledgment, but such estoppel is based upon representation and reliance rather than contract.

[51] Bank of Commerce v. Union Bank, 3 Comst. 230 (N. Y.).
[52] McCrea v. Purmort, 16 Wend. 460 (N. Y.).
[53] Witzler v. Collins, 70 Me. 290; Baker v. Union Life Ins. Co., 43 N. Y. 283.

CHAPTER IV.

ESTOPPEL BY MISREPRESENTATION.

31. **Definition.**—Estoppel by misrepresentation differs from estoppel by record in that the estoppel is not based upon a finding of fact which may not be disputed; and from estoppel by deed and estoppel by contract in that it is not based upon the agreement of the parties. The estoppel also is not mutual, as in the other cases, but applies to one of the parties only. He is estopped because he has made a misrepresentation of a material fact which he should have known was calculated to deceive and which has deceived another and caused him to act to his injury. Of course, in such an estoppel there can be no mutuality; the bar of the estoppel operates against one of the parties only. He is estopped because it is held to be unfair to the person who has been deceived to permit the one who has deceived him to change his position.

Estoppel by misrepresentation is a doctrine of comparatively recent development in the law. The old form of estoppel, which in certain cases precluded the truth from being shown, was based upon rules which were technical in their nature and arbitrary in their effect. Hence, such estoppels were considered with disfavor by the courts and were required to be strictly made out. Such an attitude does not prevail with respect to the modern estoppel by

misrepresentation, which is founded upon the "ground of promoting the equity and justice of the individual case, by preventing the party from asserting his rights under a general technical rule of law when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."[54]

32. **Misrepresentation of fact.**—The misrepresentation must be a misrepresentation of fact, as distinguished from misrepresentation of opinion. The foundation of this distinction is that, while one must rely for his information, very frequently, upon the superior knowledge of others, he is able to form from the knowledge thus acquired his own opinions or judgments. And what he can do, it is held in this instance, he must do. One cannot rely upon the superior judgment of his neighbor, and then, in an action between him and such neighbor, prevent him from showing that the judgment was erroneous. What constitutes a statement of fact and what a statement of opinion is not always easy of determination. In fact, the same statement may, between different persons or between the same persons under different circumstances, constitute at one time matter of fact and at another time matter of opinion. An illustration drawn from the law of restitution in equity may serve to explain the foregoing statements. A statement by a vendor of land with respect to the quality of the land is held, ordinarily, to be a statement of opinion, while a statement as to the price paid by him for the land constitutes a state-

[54] Horn v. Cole, 51 N. H. 287.

ment of fact. Upon the first statement the vendee is not entitled to rely, while upon the second he is. Yet it has been held in a number of cases that a statement by a vendor with respect to the quality of the land which the vendee had not seen and which he had no opportunity to examine, constituted a statement of fact. This merely means that, ordinarily, a statement of the quality of land is a statement of a conclusion based upon information open to both parties. Where the information is before both, each must form his own opinion. But where the information is not open to both, it is held sometimes, as in the illustration given, that the person to whom a statement of opinion is made is entitled to assume that it is based upon such information as such statements are usually based upon. It is where judgments are founded upon processes of reasoning open to both parties that neither is entitled to rely upon the opinion of the other.

The same rule prevails with respect to statements of intention. One is not entitled to assume that the intention of another will not change before the date of action arrives. One is, however, entitled to assume that the other is faithfully portraying his present state of mind, and, if telling an untruth with respect to that, he will be held in deceit, at least for the loss occasioned by his own misstatement.

33. **Same subject—Continued.**—It is sometimes said, in addition to the distinction taken between statements of facts and statements of opinion or of intention, that no relief can be given on the ground of a misstatement of law, as distinguished from a

misstatement of fact. The alleged distinction is commonly stated to rest upon one of two reasons, which are, however, to some extent contradictory. The first reason given is, that everyone is presumed to know the law, and, hence, cannot be deceived with respect to it; the second is, that the law is not susceptible of exact determination, hence statements of law are mere statements of opinion upon which those to whom the statements are made are not entitled to rely.

The first of these reasons probably had its inception in the statement contained in the case of Bilbie v. Lumley,[55] "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried." If every man is taken to be cognizant of the law, there could, of course, be no deception with respect to it. Thus, it has been said, "A misrepresentation of a matter of law does not constitute a fraud, because the law is presumed to be equally within the knowledge of all parties."[56] But any presumption that everyone knows the law has no basis in fact. If there is such a presumption and the presumption is held to be conclusive, this is but another way of saying that one's knowledge or ignorance of the law is immaterial. But that is the rule that is applied in criminal actions, on sound grounds of public policy, when ignorance of the law is attempted to be pleaded as an excuse for the commission of an act which is alleged to create a criminal liability. It is not be-

[55] 2 East 469 (Eng.).
[56] Powell v. Smith, L. R., 14 Eq. 85 (Eng.).

lieved that this rule is equally applicable in a civil action between private parties.

The second reason stated seems to be based on better grounds. It is true that a statement of the law with respect to any particular question is usually the statement of a conclusion based upon an examination of the facts involved and an application thereto of certain assumed principles of law. Hence, a statement of law may be held to be a statement of opinion. So far as it constitutes a statement of opinion, the one to whom it is made is not entitled to rely upon it, for the reasons given above. But there may be statements of law which involve the assumption of certain facts upon which the one to whom they are made is entitled to rely. Moreover, the distinction between law and fact is not clearly defined, and it is not true that all so-called questions of law are so uncertain that they constitute matter of opinion within the meaning of the rule that one is not entitled to rely upon statements of opinion. Hence, while the distinction between statements of fact and statements of opinion seems to be sound and justifiable, the distinction between statement of law and statement of fact seems neither sound nor useful.[57]

34. **The fact must be material.**—It seems almost self-evident that the misrepresentation which justifies an estoppel must be material. An action predicated on a statement of an immaterial fact cannot warrant an estoppel. But what constitutes a material fact is not easily determined. In the great majority of cases the materiality seems to be assumed when

[57] Ewart, Estoppel, pp. 72-78.

reliance is proved. No doubt a presumption of materiality naturally arises in such a case. Yet it seems that it should be permitted to be rebutted, if possible. In few cases does the effort seem to have been made, however, in such a manner as to call for a judicial definition of materiality. But it seems that there can be no doubt of the theoretical soundness of the definition of Sir Frederick Pollock, who defines it as "Anything which would affect the judgment of a reasonable man, governing himself by the principles on which men act in the kind of business in hand."[58]

35. **Misrepresentation need not be intentional.**—For the purpose of discussing the moral quality of the misrepresentation the following exceedingly useful classification has been made: First, misrepresentations have been divided into (a) personal, and (b) assisted misrepresentations; second, the personal misrepresentations have been subdivided into (a) active, and (b) passive misrepresentations.[59] By personal misrepresentation is meant, as the name implies, a misrepresentation made personally by one who is sought to be estopped. An assisted misrepresentation exists where the representation was in fact made by a third person, whose representation was, however, made possible or credible by some act of the one alleged to be estopped.

By active misrepresentation is meant a misrepresentation affirmatively made by the one sought to be estopped; by passive misrepresentation is meant a misrepresentation made by remaining silent under

[58] Pollock, Contracts (6th ed.), p. 550.
[59] Ewart, Estoppel, p. 13.

circumstances which make such silence produce an erroneous impression.

With respect to an active misrepresentation, it is clear that he who makes it is estopped even though he did not know it to be untrue, or even though he thought it to be true and was justified in so thinking. That is, lack of intention to mislead and the presence of care in making a statement will not prevent one from being estopped if it proves to be, in fact, untrue.[60] Where, however, this misrepresentation is accomplished by remaining silent where speech might be expected, some degree of moral culpability must exist in order to create an estoppel. Take a common illustration of so-called passive misrepresentation. A owns a horse which B sells to C as his, B's. When A demands the horse of C, he, C, insists that A is estopped to assert his title because he stood by when B sold the horse and did not assert his title. Now, it is evident that it would be highly unfair to estop A, unless he, when standing by, knew that B was selling the horse as his own. Such is, as might be expected, the law. To this is added the further qualification that, in order to be estopped, A must have reasonable grounds to believe that C did not know the real state of the title. Hence, in passive misrepresentation there is necessarily culpability. This is involved in the very thing represented; for what A represented to C was that he, A, knew of no reason why he should speak. If that was true, A could not be estopped.

In assisted misrepresentation it seems that negli-

[60] Ewart, Estoppel, p. 94.

gence may be essential in order to raise the estoppel. Thus, suppose that A were to place in the hands of B the power to make a misrepresentation, as by leaving in his possession a check signed by A with the amount so inserted that it might be raised; it would seem that the liability of A should depend upon whether he could be held to be negligent in so leaving the check.[61]

36. **Must be reliance.**—A misrepresentation, in order to create an estoppel, must have been directed toward the person relying upon it; and, in order to raise the estoppel, it must have been relied upon. As to the first point suggested, it is held that a stranger, to whom the misrepresentation was not intended to be made, cannot rely upon the misrepresentation and then estop the maker of it.[62] The justice of this is apparent when it is remembered that the fact that the misrepresentation was innocently made will not prevent the estoppel from arising. But it is not necessary that the misrepresentation be made directly to the one who relied upon it. A representation may be made in such a manner that it even constitutes a misrepresentation to the general public, and, if any person relies upon it, the maker is estopped to deny its truth.

Moreover, the misrepresentation must have been in fact relied upon. Though a misrepresentation be made for the purpose of producing reliance, even though intentionally false, if there was no reliance, no change of position, or, in case of change of position

[61] Ewart, Estoppel, p. 98.
[62] Hosegood v. Bull, 36 L. T. (N. S.) 617 (Eng.).

disbelief in the representation, or absence of reliance for any reason, there can be no estoppel. Thus, certain safe-makers transferred possession of a safe to a bargainee under a contract of hire and sale, and, at his request, painted his name on it. The bargainee afterward sold the safe to one who relied upon the name as evidence of title, but who could not show that he knew that the safe-maker painted it there, and, in consequence, that he relied on their representation. Hence, it was held that they were not estopped.[63]

37. **Reliance must produce prejudice.**—It is fundamental in estoppel by misrepresentation that he who asserts the estoppel must have changed his position on the faith of the misrepresentation. But, as frequently happens, the application of the rule is not always easy. Sometimes it is difficult to determine what constitutes a change of position. It does not necessarily mean an affirmative change consequent upon the misrepresentation. "If he has not acted upon it, but has means in his power to retrieve his position, and, relying upon the statement, and in consequence of it, he refrains from using these, his claim will be upheld."[64] It has been held that a mere change in the style of living constituted such a change in position as to produce an estoppel. Thus, where an officer was erroneously given credit by a paymaster for money received on his account which had not, in fact, been received, it was held that the paymaster was estopped to deny that the money had

[63] Walker v. Hyman, 1 Ont. App. 345 (Can.).

[64] Continental National Bank v. National Bank of the Commonwealth, 50 N. Y. 575.

been received, though the only change in position that was shown was the presumed accommodation of the officer to his supposed income.[65]

What constitutes prejudice is almost equally difficult of definition. Whether a man is worse or better off than he would have been if he had or had not taken a certain action is often a speculative question that does not admit of a conclusive answer. But it is probably true that it is sufficient prejudice, within the meaning of the rule, if a man has so irrevocably changed his position that it is impossible for him to get back to the position he would have been in but for the change made on the faith of the misrepresentation.[66]

38. **Effect of estoppel.**—The estoppel does not, in form, give rise to a cause of action, though its effect may be to create a cause of action where none would otherwise exist. Thus, suppose that A were to stand by while property belonging to him was sold, the circumstances being such as to create an estoppel against him, but not to give rise to an action for deceit. If he were later to take the property from the possession of the vendee, the vendee might bring an action against him for the conversion of the property, alleging title in himself, and estop the true owner to show the contrary. No other remedy would, under the circumstances, seem to be available.

Whether the estoppel applies to privies is a vexed question and one which is not, in the present state of the law, entirely clear. The soundest view would

[65] Skyring v. Greenwood, 4 B. & C. 281 (Eng.).
[66] Ewart, Estoppel, p. 149.

seem to be that the estoppel gives rise to a right in personam, in the nature of an equitable right, against him who makes the misrepresentation. In so far as the estoppel relates to specific property, an equity may thus be said to attach to it. This being true, those who purchase such property will be bound or not by the estoppel according to whether or not they are innocent purchasers for value under the rules of the courts of equity, "The rule being that the privies of a grantor who is estopped are not estopped if they are subsequent purchasers for value, and have no notice that he is estopped."[67]

[67] Rutz v. Kehr, 143 Ill. 558.

CHAPTER V.

QUASI-ESTOPPEL.

39. **General principle.**—Under the heading of this chapter it is intended to discuss subjects which do not come within the ordinarily accepted definition of estoppel, but which are so closely related in principle to the subjects properly covered by such definition that they may profitably be considered in connection therewith. The general principle underlying these cases to be discussed is that one may not accept benefits under a conveyance or contract and at the same time deny the validity and efficacy of such conveyance or contract.

40. **Election.**—An illustration of the foregoing principle may be found in cases usually discussed under the doctrine of election. Suppose that A were to make a will devising a plot of land called Blackacre to B and a second plot called Whiteacre to C. Suppose, further, that Blackacre did not belong to A, but belonged to C. Under the doctrine of election C could not claim Whiteacre under the will and at the same time deny that Blackacre passed by the will to B. Of course, C might insist that Blackacre belonged to him and deny the power of the will to convey it away from him, but he could not do this and at the same time claim Whiteacre under the will. In such a case he would be compelled to elect to accept or reject the will in its entirety. A familiar

application of the doctrine of election as thus stated is found in the case where a provision is made in a will for a widow in lieu of dower. Though dower is a statutory right, in most instances, which can not be barred by will, yet if the widow elects to take under the will she can not at the same time claim her right of dower.

The doctrine of election is not applied where it appears to be the intention of the grantor or testator that it should not be. Thus, if a testator, having two sons, devised land belonging to the elder to the younger and then, among other gifts, devised another tract of land to the elder which was expressly stated to be in lieu of that devised to the younger, the elder son would be compelled to elect between those two pieces of land only.[68] The intention to require a widow to be put to her election with respect to her dower must at common law be clearly shown.[69] By statute this rule is changed in many states and the widow is put to her election, unless the will clearly shows that it was the intention of the testator that she should not be.

41. **Acceptance under will.**—One who enters into possession of property under a will is estopped to deny that the devisor had the right to devise the property and to set up a title contrary to the terms of the will. Thus, where one entered upon land as tenant for life, under a will, it was held that his heirs could not show as against the remaindermen that the original devisor had but an estate for life;

[68] Wilkinson v. Dent, L. R., 6 Ch. 339 (Eng.).
[69] Bull v. Church, 5 Hill 206 (N. Y.).

that he had, therefore, no title; and that the supposed tenant for life under the will really held a wrongful possession, which had given him title by adverse possession.[70] An administrator or executor, also, who has taken possession of property under a grant of probate or letters of administration, will not be permitted to deny the title of the deceased without first giving up possession of the property.[71]

42. **Landlord and tenant.**—A tenant who has taken possession under a lease from his landlord will not be permitted to deny the title of his landlord for his own advantage. This has been stated to be the legal effect of carrying the contract of lease into effect,[72] but it seems not to differ in principle from the cases already discussed.

The estoppel of the tenant does not depend upon the nature of the instrument under which he holds, or whether he holds under any written instrument at all, but upon the taking of possession with the landlord's permission. The estoppel against a tenant prevents him from buying in a title adverse to that of his landlord and claiming under it; from setting up an outstanding title when action is brought against him under the terms of the lease; and from attorning to one who claims adversely to his landlord and then denying his landlord's title. If, however, a tenant is actually evicted by a title paramount to that of his landlord, he is thereby released from liability under his lease, and it has even been

[70] Board v. Board, L. R. 9 Q. B. 48 (Eng.).
[71] Smith v. Sutton, 74 Ga. 528.
[72] See Bigelow, Estoppel (5th ed.), p. 506.

held that where a tenant, to prevent actually being expelled, yielded, with the knowledge of his landlord, to the superior title of another, he was no longer estopped.[73]

It is held that one may be estopped to deny the title of another whom he has acknowledged as a landlord, even though he had been in possession at the time such acknowledgment was made. But in such a case it is open to the tenant to show that such acknowledgment was made by mistake.

A tenant is not estopped to show that the title of his landlord has expired since the creation of the tenancy. The estoppel relates to the title at the time possession was taken under the landlord or acknowledgment of the right of the landlord made. Also, even though the tenant may not show a better title than that of his landlord, he may disclaim the title of his landlord in such manner as to give the landlord a right to eject him, and thereby start the Statute of Limitations to running, which may thus enable him to acquire a title by adverse possession.[74]

The vendee who takes possession under a contract of purchase is in a situation similar to that of a tenant. While holding possession under the contract he cannot refuse to perform the obligations of his contract. If he buys in an outstanding title he can be compelled to pay the difference between the contract price and the price he has paid for such outstanding title.[75]

[73] Morse v. Goddard, 13 Met. 177 (Mass.).
[74] Bigelow, Estoppel (5th ed.), p. 534.
[75] Bush v. Marshall, 6 How. 284 (U. S.).

However, where the purchase price is already paid and the deed secured the grantee is not bound by the title thus acquired but may strengthen it by buying in any other title and relying upon it.

43. **Bailor and bailee.**—As with a tenant of land, so it is with one who enters into the possession of goods as the bailee of another. He may not for his own benefit take advantage of the trust imposed in him by denying the title of his bailor. Thus where one was sued for money had and received as the result of the sale of goods placed in his possession as auctioneer for purpose of sale it was held that he could not show title in himself.[76] But where a superior right is asserted against the bailee he will not, unless he has taken possession with knowledge of such right,[77] be compelled to account to the bailor for the goods.[78]

44. **Assignee.**—An assignee of a patent cannot refuse to account for profits under his contract of assignment on the ground of the invalidity of the patent when such invalidity has not affected the realization of such profits. Where the defendants made and sold machines under a license from the plaintiff who had a patent upon such machines, it was held, in an action on the contract under which such machines were manufactured, that the defendants could not deny the validity of the patent and must account for the profits.[79]

[76] Osgood v. Nichols, 5 Gray 420 (Mass.).
[77] Ex parte Davies, 19 Ch. D. 86 (Eng.).
[78] Biddle v. Bond, 34 L. J., Q. B. 137 (Eng.).
[79] Kinsman v. Parkhurst, 18 How. 289 (U. S.).

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The leading work on the subject of estoppel is *Bigelow* on Estoppel. Other works on the subject are *Cababe* on Estoppel, and *Ewart* on Estoppel. The last work is confined to a discussion of estoppel by misrepresentation and is an extremely interesting and valuable treatise on that subject. A valuable article on estoppel of a tenant to deny his landlord's title may be found in 5 American Law Review, p. 1. A brief statement of the general principles of the law of estoppel, supplemented with the citation of numerous cases, will be found in 16 Encyclopedia of Law and Procedure, p. 671.

QUIZ QUESTIONS

EQUITY

(The numbers refer to the numbered sections in the text.)

1. What is equity? Contrast it, in three respects, with the common law.
2. What were the two chief reasons that made a court of equity necessary? When was this?
3. How did the court of chancery come to be established? Describe its early history.
4. What states have separate courts of chancery? What is meant by the "code" states, and how is equity administered in them? How in the other states? Where does England come in this classification?
5. Comment on Selden's famous remark about equity.
6. Explain why the element of vagueness in some principles of equity has its advantages.
7. What two meanings are given to the term, Concurrent Jurisdiction?
8. Contrast equitable with legal remedies.
9. What is meant by the maxim, "Equity acts in personam"? Give two illustrations.
10. Explain what changes have been made in the effect of the maxim by statute.
11. What is specific performance of contracts?
12. What is the principle as to adequacy of the legal remedy? Explain carefully, by example, its application in specific performance.
13. Explain the application of the principle to land contracts.
14. State two or three cases (other than those in the text) in which, in your opinion, specific performance of a contract relating to personal property should be allowed.
15. Why are contracts for personal services or for continuous

acts not specifically enforced, as a general rule? State two cases (other than those in the text) where, in your opinion, an exception should be made; and explain why.

16. Explain how equity indirectly enforces some contracts by injunction.

18. State the point of difference between equity and law as to the necessity of consideration. What is the effect in equity of an inadequate consideration?

19. State a point of difference between equity and law as respects the effect of misrepresentation.

20. State a case in which the vendee's failure to disclose a fact not known to the vendor should, in your opinion, defeat his right to specific performance.

21. State two cases where, in your opinion, a unilateral mistake should be a defense to specific performance.

23. Frame two or three cases where lack of mutuality would be a good defense to specific performance. Discover, if possible, instances where lack of mutuality existed when the contract was made, and the defense in question was not allowed.

24. Frame, if possible, two cases where a doubt as to vendor-plaintiff's title (not an admitted lack of title) will defeat specific performance; explain why.

25. Explain what is meant by the phrase, "Time is not of the essence of the contract." Suppose a party waits ten years before suing.

26. State four ways in which time may become essential.

27. What is meant by the doctrine of part performance of parol contracts? On what two ideas is it based?

28. Is payment a sufficient act of part performance? Give two reasons.

29. Is taking possession a sufficient act of part performance? Give two reasons.

30. Is continuing in possession a sufficient act of part performance? Give two reasons.

31. When may personal services be a sufficient act of part performance? Explain.

32. Invent a case where the vendor may have partial specific performance with abatement from the price, and a case

where he may not; a case where the vendee may have the same, and a case where he cannot.

33. When may a vendee have specific performance as against one to whom the vendor has conveyed the legal title?
34. Against whom may covenants in deeds restricting the use of land be enforced? By whom?
35. Show how the defense of hardship may apply in the enforcement of such covenants.
36. What is the effect in equity of the contract for purchase and sale of land upon the property rights of the parties in the land? What maxim is involved? What result when the vendor dies? When the vendee dies?
37. What is meant by the vendor's lien? How is it enforced? What is the effect of the vendor's assigning his claim for the unpaid purchase price?
38. What is the duty, with respect to care of the premises, of the vendee in possession? Of the vendor in possession? What is the result of accidental destruction of the premises by fire?
39. Review the thirteen general doctrines or principles of equity which have been illustrated in the paragraphs on specific performance, and show how each is applied.
40. What are preventive, mandatory, final, preliminary injunctions?
41. Distinguish waste from trespass. Mention some instances of waste that will be enjoined. When may an accounting for waste be had in equity, and what general principle of jurisdiction is illustrated?
42. Explain what is meant by equitable waste.
43. On what grounds will equity enjoin trespass? State three imaginary cases, each involving one of these grounds.
44. In a suit to enjoin trespass, what happens where the title to the land is in dispute?
45. When may a mandatory injunction be had in trespass cases?
46. Give two imaginary cases where an injunction would lie against trespass to personal property.
47. When does injunction lie against a nuisance?
48. When is a trial at law necessary in a suit to enjoin a nuisance?

49. State what is meant by "balancing the injuries" on motion for a preliminary injunction; and if possible, illustrate.
50. Criticize the practice of balancing the injuries as applied to final injunction against nuisance. What should be done when copper smelters, the chief industry of a large town, ruin the vegetation on neighboring farms?
51. What is the effect of delay on injunction against nuisance? When will a mandatory injunction be given?
52. Who may enjoin a public nuisance?
53. What are the chief questions involved in a suit to enjoin the infringement of a patent? Why does the court not send these questions to a jury for trial?
54. In such suit, what showing must plaintiff make to warrant an injunction before trial?
55. In a suit for infringement, what is an accounting of profits? When may it be had, and when not?
56. In a suit for injunction against infringement of copyright, must plaintiff show damages? How does the "clean hands" maxim apply? State some instances of enjoining publication of uncopyrighted literary property.
57. Why should the copying of a trade mark be enjoined? State facts of three imaginary cases where "unfair competition" should be enjoined. Illustrate the application of the "clean hands" maxim.
58. What about enjoining libels? Torts by striking workmen? What of the objection that the acts are crimes?
59. State three propositions as to injunctions against state officers. What is the remedy in equity when the board of supervisors of a city are threatening illegal or fraudulent acts, and on what grounds is it based?
60. State two grounds on which improper taxation may sometimes be enjoined.
61. Can a railroad which is about to take property without condemnation proceedings be enjoined? Why? When will injunction lie against a railroad which is authorized to lay its tracts in a public street?
62. Give three instances of injunction in aid of other equitable remedies.
63. What may a person do who is sued at law and has a de-

fense recognized only by courts of equity? How is it in the "code" states?

64. Mention a case of an injunction against a judgment at law obtained by accident; obtained by fraud. What important exception is there to the enjoining of fraudulent judgments? Explain why.
65. What is the remedy of cancellation? Suppose the defense to the instrument appears upon its face? Suppose the instrument is negotiable?
66. What is the state of the law as to cancellation when the defense does not appear on the face of the instrument, which is non-negotiable?
67. What is reformation? When may it be had? Give an illustration in addition to that of the text.
68. Give another instance of reformation for a mistake of one party known to the other.
69. Give three other examples of situations where reformation for mistake cannot be had.
70. Give three other instances, parallel with those of the text, where rescission for mistake may be had.
71. Give an instance where rescission for mutual mistake cannot be had.
72. Give an instance of unilateral mistake for which there is no relief.
73. Give another example of unilateral mistake in making the contract for which there can be relief.
74. State and illustrate three propositions as to mistake in gifts.
76. Give an example of a mistake of law which cannot be relieved against. What is the policy of this rule?
77. State, if possible, another case of reformation for mistake of law.
78. State, if possible, a case of mistake of law with inequitable conduct of the other party.
79. State, if possible, a case of mistake as to a party's existing rights; and explain the rule.
80. What exception is there to the last rule?
81. What is the state of the law as to a mistake of law in making a gift?
82. State and explain the case in the text, and, if possible, an-

other case, where there are proceedings at law by numerous parties against one person, each involving the same question.

83. State and explain the four cases in the text; suggest, if possible, similar cases.

84-85. State and explain the four cases in the text; if possible, suggest similar cases.

86. State and illustrate the limitation on the principle of the last four sections. See if the illustrations you have made to these sections comply with this limitation.

87. State and give a new illustration of what is meant by a cloud on title.

88. When is plaintiff, in a suit to remove a cloud, required to be in possession, and when not? Reasons?

89. Explain and illustrate the rule that an instrument invalid on its face is not a cloud, applying the test mentioned in the text. Criticize the rule.

90. What is the statutory suit to quiet title; how does it differ from a suit to remove a cloud; when is it legal and when is it equitable?

91. What is the purpose of a suit for partition? Suppose the title of one or more of the parties is disputed?

92. Give a new illustration of what is meant by "owelty of partition."

93. When may a partition sale be had?

94. When may a partition of personal property be had?

96. For what three purposes may creditors' suits be brought, and what is the advantage of the suit in each of the three cases?

97. How far must the creditor proceed at law before bringing the suit in equity?

98. Exoneration: what two meanings?

99. Give example of the remedy of contribution; what advantages has it over the remedy at law? What maxim does it illustrate?

100. What are the advantages of the equitable remedy of accounting? Mention five situations in which it may be had.

101. When may accounting be had between principal and agent?

103. Give another example of a case where, in your opinion,

interpleader may be had. What are the advantages of the remedy? Describe the procedure briefly.

104. State, if possible, another case where the rival claims are not for the same thing, debt or duty.
105. State, if possible, another case where the plaintiff is not a mere stakeholder.
106. State, if possible, another case where there is no privity between the claimants. Criticize the rule.
107. State, if possible, another case where the plaintiff is under an independent liability to one of the claimants. Criticize the rule.
108. What is a receiver? What are the general principles governing his appointment?
109. When may a receiver be appointed in a suit to foreclose a mortgage, and for what purpose? Mention three other common cases where a receiver is proper.
110. Mention four cases where a corporation receiver may be appointed, without statutory authority.
111. What happens when the receiver's possession is interfered with? Why? Give three instances of such interference.
112. What happens when suit is brought against the receiver without leave of court?
113. Describe the receiver's duty as to management of the property. What are receivers' certificates?
114. Describe preferred claims in railroad receiverships. On what theory do they rest?
115. What is discovery in an equity suit, and what is the bill for discovery?
116. What modern statutes have affected the bill for discovery and how?
117. What were the suits for the examination of witnesses?
118. Describe equitable estates. Review fully the equitable interest of the vendee of land.
119. Describe uses.
120. What was the Statute of Uses, and when was it passed? What effect was given to it by the courts?
121. Classify trusts. What is a passive trust?
122. What are express active trusts, and what are some of their commonest purposes?

123. Who brings actions at law relating to the trust property?
124. Describe "spendthrift" trusts.
125. What happens on the death of a cestui que trust who has an interest greater than a life estate?
126. Distinguish between private and charitable trusts, and give two other illustrations showing the distinction.
127. Give three other examples of charitable trusts for various purposes.
128. How must an express trust in lands be proved? Illustrate.
129. What are the distinguishing features of resulting and constructive trusts?
130. Give an example of each of the two classes of resulting trusts. What is the effect of a man's purchasing property in the name of his wife?
131-132. Give four examples of different species of constructive trusts.
133. What is a trust ex maleficio? Give two examples.
134. Mention three duties of an express trustee. What should he do if in doubt as to his duties?
135. Mention four rules as to trustee's duty of care and diligence. How should he invest the trust funds?
136. What compensation is the trustee entitled to?
137. Give four examples of removal of a trustee, and four of the appointment of a trustee by the court.
138. Describe how corporation directors may be sued for breach of trust, giving reasons.
139. What is the equitable separate estate of a married woman? Who is the trustee?
140. What is her power to dispose of it, and to make contracts, under the English system?
141. What was the restraint upon anticipation?
142. What was the wife's equity to a settlement?
143. Give two illustrations of equitable conversion (other than that arising from contract of sale).
144. What is reconversion? When is it not allowed?
145. Why has equity less jurisdiction over the administration of estates of decedents in this country than in England?
146. Describe the jurisdiction over infants.
148. What was a mortgage, at common law? What was the

equity of redemption? What was the duty of the mortgagee in possession? What was foreclosure?

149. Mention two points of difference between the English mortgage system and the system in the "title theory" states.

150. Describe the system in the "lien theory" states. How about the mortgagee's possession in such states?

151. Describe foreclosure by sale. What title passes? What about a deficiency or a surplus?

152. Distinguish between a conveyance with option to repurchase, and a mortgage. When will a deed, absolute on its face, be treated as a mortgage? On what theory?

153. What is the effect of the assumption of the mortgage debt by the mortgagor's grantee? State and illustrate fully the relation between such grantee, the mortgagor, and the mortgagee.

154. What is the effect of assigning the debt secured by the mortgage? Suppose the debt is evidenced by a negotiable note?

155. What is meant by the sentence, "Once a mortgage, always a mortgage"? Illustrate. What is the reason for the rule? What is the effect of a sale of the equity of redemption to the mortgagee?

156. Who may redeem from the mortgage? How?

157-158. Give five illustrations of subrogation. Explain fully.

159. Explain marshaling of securities.

160. Explain the inverse order of alienation rule.

161. Describe an equitable lien.

162. Give three examples of an equitable lien.

163-164. Distinguish the grantor's from the vendor's lien.

165. State three restrictions, generally recognized, on the grantor's lien.

166. Distinguish the grantor's implied lien from the grantor's reserved lien.

168. Explain assignment by order upon a fund.

169. Explain and illustrate assignment of expectancies.

170. Illustrate sale or mortgage of after-acquired property. What effect at law?

171. State two cases where equity will relieve from the effects

of accident, and one where it will not. How did equity come to have jurisdiction of suits on lost instruments?

173. State Lord Hardwicke's classification of frauds. What important difference between the legal and the equitable rules as to misrepresentation?

174-175. What is the effect of non-disclosure of secret information by a party entering into a contract? Of active concealment?

176. What is the effect of inadequacy of consideration in equity?

177. State three propositions as to the effect of deficiency in mental ability; three propositions as to the effect of intoxication.

178. How does equity treat the contracts of expectant heirs and reversioners?

179. What is undue influence?

180. State three rules of presumption as to the validity of transactions between persons in a fiduciary relation. State eight instances of such relation.

181. When does ratification of or acquiescence in a fraud defeat relief?

182-183. State the in pari delicto rule, and three limitations or exceptions. Invent an illustration of each.

185-186. State the six elements of equitable estoppel. Invent another illustration, and show how it complies with each of these elements.

187. State two applications of the principle of estoppel, supplying facts for the rules of the text.

188. State the ground of the doctrine as to penalties and forfeitures.

189. Give one other example of a penalty, and two of liquidated damages.

190. State three rules on the subject of relief against forfeitures.

191. Give another case illustrating and explaining the doctrine of election.

192. Give another illustration of election where the donor has a partial interest.

193. State the rule of equity, and of the statutes, as to election by a widow concerning her dower.

194-195. State and illustrate the four classes of satisfaction. Which is most important? Explain fully the theory of the third class.

196. Distinguish between notice and knowledge.

197. What is actual notice? Explain putting on inquiry. Give, if possible, two other examples.

198. What information does, and what does not, put on inquiry? Illustrate, if possible.

199. Explain notice by possession.

200. State, with reasons, effect of notice of possession by a tenant; of possession by grantor; of possession not exclusive. Illustrate each.

201. What is notice by lis pendens? Reason for it? When does it begin and end? In what suits?

202. What is a chain of title? Give another illustration of notice by express reference therein, and state the two cases in the text of notice inferred.

203. How does a recording act usually read? What effect? What is the effect of the recording officer's mistake? Reasons? Of the destruction of the record?

204. Explain the rule that the record does not act as notice retrospectively; the rule as to a break in the chain of title.

205. Explain the effect of other notice in place of a record.

206. What is the rule as to notice to an agent? Reason? Effect of notice received in a former transaction?

207. What is meant by valuable consideration in the law of bona fide purchaser? Is an antecedent debt a valuable consideration?

208. Is a promise to pay ever the equivalent of payment? Reasons? What is the effect of part payment before notice?

209. What is the effect of purchase with notice from a bona fide purchaser? Exception? Reasons for rule and exception?

210. State three rules on the subject whether a quitclaim grantee can be a bona fide purchaser.

211. In what classes of suits might the defense of bona fide purchaser be set up, before the recording acts? What suits have the recording acts, as interpreted, added? Have they enlarged the jurisdiction of equity?

212. On what maxims is the doctrine of priorities based? Show what use is made of them.

213. What is the peculiarity of a purchase money mortgage? How do we ascertain the priority between a docketed judgment and an earlier unrecorded mortgage? Between a purchase at execution sale and an earlier unrecorded mortgage?
214. Show the effect of fraud on the part of the holder of a superior equity. The effect of notice by the holder of a later equity, and of lack of notice.
215. How are priorities between rival assignees of a thing in action determined?
216. State the eleven maxims.
217. What is the meaning of the maxim, "Equity will not suffer a wrong without a remedy"? Review §§ 1-8.
218. What is the meaning of the maxim, "Equity follows the law"? Review the paragraphs referred to.
219. What is the meaning of, "He who seeks equity must do equity"? Invent three additional examples, if possible.
220. State the two cases of this paragraph. What do they show as to the effect of this maxim?
221. What difference between the "clean hands" and the "do equity" maxims? Review the paragraphs referred to. Give five illustrations of the maxim.
222. Give another illustration of the limitation on the "clean hands" maxim.
223. Explain laches in suits (1) by cestui que trust, (2) by a person in possession of the land, (3) for injunction against nuisance. What rules?
224. State the underlying principle as to laches here laid down. State and explain three instances of laches in accordance with this principle.
225. Review all the references.
226. Review all the references.
227. What does this maxim mean? Review the references.
228. Give two applications of the maxim, "Equality is equity."
229. Make a full summary of all the special rules, in each remedy, relating to the inadequacy of the legal remedy.
230. Review the references in the notes. State the rules on the subject of damages in place of specific performance.
231. Review the references in the notes.

QUIZ QUESTIONS

LAW OF TRUSTS

(The numbers refer to the numbered sections in the text.)

1. Name the essential elements of a trust.
2. Is there any distinction between a trust like the Standard Oil Company and the trusts discussed in this article? What?

3-4. (a) In what system of law was the trust invented? (b) What business need caused the invention of the trust?

5. (a) What was the difference between a trust and a use before the Statute of Uses? (b) What is the difference now?

6-8. (a) What was the Statute of Uses? (b) What effect did it have upon the law of trusts?

9. If you deposit money in a bank, is the bank a trustee of your money or your debtor? What difference does it make?
10. A stores household goods at a warehouse for the summer. Is the warehousekeeper a trustee of the goods? Why?
11. A gives land to his son B, "paying his brother C $250 a year." Is B a trustee for C? Why?
12. A attempts to assign a promissory note to B in a state where choses in action are not assignable. Is A a trustee of the note for B? Why?
13. A has been appointed both executor and trustee under his father's will and asks you how his duties and liabilities under these two relationships differ. What answer?
14. A sends a carload of stock to B to sell for him and remit the proceeds. Is B a trustee of the stock for A? Why?
15. A has been appointed the general guardian of B, an infant. In what ways is his situation different from that of a trustee for B?
16. What are the common classifications of trusts?

17-18. A gives property to his son B by will and then adds the following clause: "But I request my son B to bear in mind the needs of my sister X and to provide for her from the property given to him, according to her need." Is B a trustee for X?

19-21. (a) A delivers personal property to B in trust for C. No writing is made but it is orally stated that B shall hold as trustee for C. Can C enforce the trust? Why? (b) A has a conversation with B in which he tells him that he (A) will hold a certain tract of land in trust for him (B) during B's life and pay B the income thereof. Later A denies that any such conversation took place. B has witnesses to prove that it did. Can he enforce the trust? Why?

22. Is there any difference between the formality necessary to create a trust in land by will and by deed? Why?

23. A delivers to B a paper declaring that he holds described land in trust for B. B pays A nothing for this declaration. A refuses to carry out the trust on the ground that there was no consideration for it. Can B enforce the trust? Why?

24. A owns land and executes and delivers to C a writing in which he states that he desires B to become a trustee of this land for C. Is this sufficient to create a trust?

25. A owns a bond for $1000 and desires to make himself a trustee of it for B. How can he do it?

26. A signs a paper declaring himself a trustee of an insurance policy for B. The paper lies in his safe until his death and no one has seen it except A. After his death B seeks to establish a trust. Can he do it?

27-28. A deposits money in a savings bank. The account is, at his request, entitled "A in trust for B." A later dies and B then learns for the first time of the deposit and claims the money. Can he get it?

29. A by will appoints B trustee of all his property in trust for C. B refuses to accept the trust. C inquires of you whether the trust fails on that account.

30. What bearing does the Statute of Frauds have on implied trusts in land?

31. A conveys land to B without the payment of any consideration. Is B a resulting trustee for A? Why?

32. A devises land to B "on the trusts hereinafter declared." No mention is made of any trusts elsewhere in the will. What is the effect of such a devise?

33-34. A pays $1000 to B for some land. At A's request B conveys the land to C. Is C a trustee of the land for A? Why?

35. A is an agent of B and has in his possession $1000 belonging to B. With B's consent A buys land in his own name and pays for it with the $1000. Does any trust arise? Why?

36. What is the practical result of a constructive trust?

37. A fraudulently procures from B the conveyance of a tract of land. Has B any remedy in the law of trusts? What?

38. A agrees orally to sell land to B, but later repudiates his promise. Can B have A declared a constructive trustee of the land?

39. A is trustee of certain land for B. It is his duty to sell it and he advertises a public sale. At that sale C, a friend of A, buys the land for a fair price and immediately conveys it to A for the same price. B objects to this. Has he any remedy?

40. A is trustee of certain land for B. A makes a contract to buy B's interest in the land for its full value. If the contract is carried out, will A's title be subject to attack by B?

41. Distinguish dry, public, active, charitable and passive trusts.

42. A conveys land to B "in trust for C" with no further declaration of the purposes of the trust. How will the trust be administered?

43. To what purposes were trusts restricted at common law?

44-45. In a state having the New York system of statutory restriction on trust purposes, A conveys land to B in trust to divide it among A's children in equal shares. What is the effect of such a conveyance?

46. (a) A leaves a will creating a trust to begin when a man named Smith is elected president of the United States. Is the trust subject to any objection? (b) A by will creates a trust to last "from the date of my death until the last of my grandchildren shall die." Is the trust subject to any objection?

47. A devises land to B to hold in trust for C, collect the rents

and profits, retain them until C reaches 45 and then pay them to C. Is the trust subject to any objection?

48-49. Why was it advantageous at common law to create a trust for a married woman?

50. (a) What is the meaning of the phrase "spendthrift trust"? (b) A conveys land to B to hold in trust for C and provides that B shall pay C the net income of the property, but that C shall not be allowed to anticipate the income by alienation nor shall C's creditors have any right to take the income of the property until it is paid to C. Is the trust valid in all its provisions?

51-52. (a) How are charitable trusts distinguished from private trusts? (b) What effect did the Statute of Charitable Uses have on the law of charitable trusts?

53. Are the following proper purposes for charitable trusts: (1) to erect a monument to Andrew Jackson; (2) to provide the city of Chicago with sanitary drinking cups for its public fountains; (3) to provide for European travel for the poor relations of the settlor; (4) to provide for research to discover the causes of the disease of cancer?

54. A by will creates a trust to buy school books for the poor children of the school district of X. Before A's death the school district of X is united with two others to make a new district. What will become of the trust?

55. (a) A devises land to B in trust for the poor of the village of X, but provides that when England and France next engage in war, the land shall go to C. Is there any objection to this provision? (b) A bequeaths money to B to care perpetually for the sick of the city of St. Louis. Is this a proper charitable trust?

56. (a) Are there any restrictions upon the capacity to create trusts? (b) What property may be the subject-matter of a trust?

57. A appoints the state of Michigan trustee of his property to establish and conduct an orphan asylum. Is the trust enforcible? If so, how?

58. A leaves a will appointing X trustee of certain land for C. X dies before A. Is the trust invalid on that account?

59. How are trustees appointed in case of a vacancy in the trusteeship?

60. A appoints B trustee of all his property in favor of C. B does not desire to accept the trust. Must he do so? If not, how can he avoid acceptance?
61. When is it necessary for a trustee to give a bond for the faithful performance of his duties?
62. What are the differences between the express powers of the trustee and his implied powers?
63. A is the trustee of certain houses for the purpose of paying the net income to B. The trust instrument gives him no express power to lease, insure, repair or improve the houses. Are any or all of these powers implied in his favor?
64. (a) A is trustee with an express power of sale of land. May he exchange the land for other land? (b) If he sells the land and the title proves defective, who will be responsible for the loss to the buyer?
65. A and B are appointed joint trustees of certain land with the power to sell it. A wants to sell to X and B wants to sell to Y. Can either alone give good title?
66. A is trustee of land for B with a power to mortgage. A authorizes his attorney to execute and deliver in his name, whenever the attorney sees fit, a mortgage on the property. Would a mortgage executed by the attorney under this authority be valid?
67-68. A is a trustee of land for B. A is unable to rent the land and pastures his own cattle thereon, paying nothing for the privilege. Is this proper? If not, what remedy has B?
69. A receives as a part of the trust property put into his hands as trustee a note against X who is then solvent. A waits a year before attempting to collect the note and then when he sues upon it finds that X is insolvent. Has A performed his duty as a trustee? Why?
70. A has $5000 of trust funds in his hands. He puts $1000 in a bank on call deposit, lends $1000 to B who is solvent, but gives no security, buys a share of Pennsylvania Railroad stock with $1000 and takes a first mortgage on a farm worth $2500 in exchange for the last $2000. Are his investments proper?
71. A gives $5000 by will to B in trust to collect the income from it until C reaches 30 and then pay the entire sum of principal and income to C. C reaches 21 and desires to obtain

the $5000 and accumulated income. Can he get it then or must he wait until he is 30?

72. A is the beneficiary of a trust and tells you that he thinks that B, the trustee, has been gambling and wasting the trust funds. How can A find out the exact situation of the trust property?

73. A is trustee of real property and has paid certain taxes out of his own funds, there being no trust funds on hand. On his accounting what are A's rights with respect to this expenditure and with respect to compensation for his work as trustee?

74. A is trustee of certain bonds which he keeps in a safety deposit box from which they are stolen by a bank clerk. Is A liable to the beneficiary for the value of the bonds?

75. A and B are co-trustees. During A's absence B gets possession of all the trust funds and absconds. Under what conditions, if at all, will A be held liable for the loss?

76. A is a trustee for B and they find it very difficult to agree and frequently quarrel. Can B have A removed from the trusteeship?

77. What is the objection to allowing A to create a trust for the benefit of such persons as B, the trustee, may select?

78. A creates a trust in favor of B. Although he knows of it, B takes no steps to accept or refuse the trust for six years. What is the effect of such inaction?

79. (a) May the beneficiary of a trust sell his interest? (b) Who is entitled to discharge obligations owed to the trust estate?

80. A is trustee for B and has wasted the trust property. In what court should B seek a remedy?

81. A is trustee of land for B. X comes upon the land and removes timber, without the consent of either A or B. May B maintain trespass against X?

82. A is trustee for B and threatens to sell the trust property at a private sale, whereas much more could be obtained for it at a public sale. Can B force a public sale?

83. A is trustee for B. A becomes insane and his acts endanger the trust estate. How can B obtain relief?

84. A, as trustee for B, invests $5,000 in the stock of a corporation which fails. May B hold A liable in money for this act?

85. (a) A is trustee for B and wrongfully mingles the trust moneys with his own money by depositing them in his private bank account. A goes into bankruptcy. In what circumstances can B claim the amount of the original trust fund from the bank? (b) A is trustee for B and wrongfully transfers the trust property to C who pays what it is worth to A and who thinks that A is the owner of the property. A is insolvent. Can B retake the property from C?

QUIZ QUESTIONS

LAW OF QUASI-CONTRACTS

(*The numbers refer to the numbered sections in the text.*)

1. What obligations are included in the term quasi-contract as used in its broadest sense?
2. State two points of resemblance between quasi-contracts and true contracts.
3. What is the chief point of distinction between quasi-contracts and true contracts?
4. Distinguish the obligation of quasi-contract from the duty not to commit a tort.
5. What is the relation of common law procedure to the scope of quasi-contracts?
6. What is the most important source of quasi-contractual obligation?
7. How and when was this source of quasi-contractual obligation recognized as cognizable by a law court?
8. Is an actual enrichment of the defendant essential to the plaintiff's recovery on the theory of unjust enrichment?
9. What is meant by waiving the tort and suing in assumpsit?
10. A negligently runs his automobile into B's carriage, completely wrecking the carriage. May B maintain assumpsit against A?

11-12. A uses B's horse for one month without B's consent and returns the horse at the end of the month in as good condition as it was at the beginning. May B maintain assumpsit against A?

13-14. A converts two cows belonging to B. The first of these cows he sells to C for $50 cash; the second he keeps for his own use. May B maintain assumpsit against A for money had and received? for goods sold and delivered? May he maintain assumpsit in any form against C?

15. A goes to Europe leaving his house unoccupied. In his absence B takes possession and occupies the house until A's return. May A maintain assumpsit for use and occupation?

17. A is the lawful husband of B. He deserts her and asks C to marry him, falsely representing to her that he is divorced from B. C believes him, accepts his proposal, goes through the forms of a marriage ceremony with him, and lives with him as his wife for one year, performing the usual domestic services incident to the status of a married woman. May C, upon discovering A's fraud, maintain assumpsit against him for work, labor and services?

19-20. When is an election between tort and assumpsit irrevocable?

21-22. What amounts to duress of person?

23. A has been a guest at B's hotel. His bill at the agreed rates amounts to $50, but B charges him $75 and refuses to let him have his trunks and baggage until the amount charged is paid. In order to secure possession of his property A pays the full amount exacted. Has he a quasi-contractual remedy for the excess?

26. The law allows a county recorder of deeds to charge $2 for recording a deed of a particular description. A citizen presents such a deed for record, inquires as to the amount of the fee, is told by the recorder that it is $5, and thereupon pays $5 without protest in order to have the deed recorded. Has the citizen a quasi-contractual remedy for the excess?

27. A railway company is permitted but not required by law to let floor space in its stations to news vendors. Plaintiff applies for such space in one of the company's stations, is told that he may have the space, but only on condition of paying monthly in advance what is in fact an unreasonable rental. Plaintiff takes the space and pays a month's rent in advance, protesting at the time against the unreasonable rental. Has he any remedy for the excess?

28. A statute forbids money lenders to take more than 10% interest per annum. A applies to B for a loan and offers to pay 15%. B accepts the offer, advances the money, and at the end of the year is repaid by A the amount of the loan,

together with interest at 15%. A then sues B in assumpsit for the full amount of the interest so paid. What result?

32. A owes B $100, which he pays in full; B forgets that the debt has been paid and demands $100 of A, who refuses to pay him anything; B thereupon sues A for the amount claimed and attaches a stock of goods belonging to A as security. To free his goods from the attachment A pays B the $100 a second time under protest. Has A any remedy?

33-34. A owes B $100, which he pays in full. He makes the payment in the presence of C and D. B later sues A for the amount of the debt and A pleads payment. At the time of the trial C and D are out of the jurisdiction and hence not available as witnesses. The jury believes B's testimony that the debt has not been paid. The result is a verdict and judgment for B for $100. A pays the amount of the judgment. C and D then return to the jurisdiction. A, relying upon their availability as witnesses, now sues B in assumpsit for $100. What result?

38-40. A statute provides that the mortgagee of real property shall pay the taxes assessed on such property in the proportion that the mortgage debt bears to the assessed valuation of the property. The mortgagee of a particular tract neglects to pay the taxes thus assessed to him. The mortgagor, in order to prevent the sale of the land for taxes, pays the full amount assessed to the mortgagee. Has he any remedy against the mortgagee?

42. A and B are employees of C and D, who are partners. By their joint negligence, while acting within the scope of their employment, they injure a horse belonging to C and D and a cow belonging to E. C and D sue A for the injury to their horse and recover full damages from him. May A, upon paying the damages assessed, have contribution from B? Now suppose that E sues C and D for the injury to his cow, that he gets judgment against them and that they pay it; have C and D any remedy against A and B?

48. A's team of horses, hitched to a wagon, is running away. B, in order to save A's property from destruction, stops the runaway at great personal risk. May he recover against A for the service thus rendered?

49. A, finding B's watch, takes it to a jeweler and has it

repaired. B afterwards claims the watch and A surrenders it. May A recover of B the amount paid for repairing the watch?

50-54. A owed B $50. He paid the debt and then forgot that he had paid it. He offered to pay B $50 again. B said, "I believe you paid me some time ago." A answered, "No, I am sure you are mistaken. Anyway I'll take the risk." Thereupon A paid B $50. Later he discovers evidence that he was mistaken. May he recover for the second payment?

55-56. A believes that he has discovered a process for the profitable treatment of low grade ore regarded as waste. Actuated by this belief he pays B $5000 for 10,000 tons of such ore. After repeated tests of his new process he discovers that he was mistaken and that the rock purchased by him must still be regarded as waste. Has he any remedy against B?

57. A and B agree that A shall sell and B shall buy 1000 bushels of wheat at $1 per bushel. By mistake A delivers 1100 bushels to B, which B accepts and uses, he, too, being mistaken as to the quantity. Intending to pay for 1000 bushels at the agreed price, B pays A by mistake $1050 instead of $1000. B sues A for the overpayment of $50. What result?

58-60. When, if ever, will the negligence of the plaintiff prevent his recovery for a benefit conferred by mistake?

61-62. A makes a conditional acceptance of an unconditional offer of employment by B. Erroneously supposing that such an acceptance created a valid contract, he proceeds to perform the services contemplated by the offer of B, but without the latter's knowledge. May he recover for the services rendered?

67 and 69. A, B, and C enter into a conspiracy to defraud D. For the purpose of the conspiracy A turns over $100 to B and C. Before any steps have been taken toward the accomplishment of the fraud, A decides to withdraw and demands his money back. B and C refuse to return the money. Has A any remedy?

70-71. Discuss the recovery for benefits conferred under contracts unenforcible on account of the Statute of Frauds.

73-74. A agrees to work for B one month for $100. He works two weeks but is unable to finish the month on account of illness. Assuming that he was to be paid at the end of the

month, has he any remedy for what he has done (a) in America, (b) in England? Assuming that he was paid in advance, has B any remedy (a) in America, (b) in England?

75-78. A agrees to build a house for B for $5000. He starts to perform the contract and continues in good faith until half the work is done. May he recover in quasi-contract for what he has done under any of the following states of fact? (1) He stops on account of a quarrel with B. (2) He stops on account of inability to secure workmen caused by a boycott of builders' unions against him. (3) He stops because of a fire that destroyed the building in course of erection. (4) He stops because B forbids him to proceed any further.

79. A deeds land to B in consideration for which B agrees to support A during the remainder of A's life. B supports A for six months after the delivery of the deed and then refuses to support him further. Has A any quasi-contractual remedy?

QUIZ QUESTIONS

LAW OF ESTOPPEL

(The numbers refer to the numbered sections in the text.)

1. Define estoppel.
2. In what way do different kinds of estoppel arise from a judgment?
3. In case the record of a judgment is incorrect, what relief may be secured?
4. Why should a judgment be conclusive as to the law and facts found and adjudged as between the parties?
5. Upon what must a judgment have been rendered to have the effect of an estoppel?
6. In order that a judgment may bind the same parties in a subsequent action, what is necessary with respect to the cause in issue?
7. Supposing that, in an action brought by A against B asking for the rescission of a contract for the sale of a horse by A to B, on the ground of fraud, it was determined that B was not guilty of fraud in making the sale, would such finding prevent A from setting up fraud as a defense to an action for the purchase price? Why?
8. If, in an action between A and B, A were found guilty of defrauding B, would such finding be binding on A in an action against C for libel for accusing A of defrauding B?
9. What is meant by privity? Illustrate.
10. Under what circumstances may the question of want of jurisdiction be raised by the parties to an action in another proceeding?
11. A sued B upon a debt which B had paid, but owing to his inability to find the receipt A recovered judgment. B later found the receipt. Is the judgment binding in another action between the same parties?

12. What is a "judgment in rem"? Upon what does its conclusiveness seem to depend?
13. What important distinction is found between foreign judgments in rem and domestic judgments in rem?
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ORIGIN AND NATURE OF EQUITY.

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GARDNER v. OGDEN.

22 N. Y. 327, 78 Am. Dec. 192. 1860.

Appeal from the Supreme Court. Action to avoid a deed as fraudulently obtained from the plaintiff, and to compel the defendant Smith' to reconvey to the plaintiff the real estate therein described.

DAVIES, J. The first question necessary to be considered is, whether the Supreme Court had jurisdiction of the subject-matter of this action. That court, under the reorganization of the judicial system of this state, under the Constitution of 1846, succeeded to all the powers of the Court of Chancery, and to all the jurisdiction which it possessed and was accustomed to exercise. This question caused embarrassment to the special term in this case; and it seemed to doubt its power to order in direct terms the defendants, or either of them, to reconvey the premises deeded by the plaintiff to Smith, on the ground that the court had no jurisdiction, for the reason that the lands, the subject-matter of the action, were situated without the boundaries of the state. The Supreme Court, at general term, in its opinion, says: "If the sale to Smith could be avoided on the ground of the relation in which he stood to Ogden, Jones & Co., the action for that purpose should have been prosecuted against Smith alone, and before some tribunal having cognizance of the subject-matter of the action. The premises being in another

state, an action for their recovery cannot be successfully prosecuted in this court." In this view of the authority of the Supreme Court to entertain this action, we think the learned courts below fell into a grave error. It is true that, by § 123 of the Code, actions for the recovery of real property must be tried in the county in which the subject of the action is situated. The Supreme Court of this state, as a court of equity, could not, therefore, take jurisdiction of an action for the recovery of lands situated in another state, where the proceeding was in rem; but where it has jurisdiction of the proper parties, it may, by its judgment or decree, compel them to do equity in relation to lands located without its jurisdiction. The court, in such a case, acts in personam. We regard this as so well settled by authority that it cannot longer be seriously questioned. A review of the authorities in England and this country will, we think, place this matter beyond all doubt. * * * The case of Massie v. Watts, 6 Cranch, 148, is quite in point. There a bill was filed in the Circuit Court of Kentucky against the defendant, a citizen of Kentucky, to compel him to convey to the plaintiff lands in the state of Ohio to which the defendant had obtained the legal title, the plaintiff claiming to be equitably entitled thereto. The Circuit Court sustained the bill, and made a decree that the plaintiff recover of the defendant Massie the lands claimed, and convey the same to him; and that upon such conveyance being made, the plaintiff should assign to the defendant all his claim to another quantity of land mentioned in the decree. From this decree an appeal was taken to the Supreme Court of the United States, and there affirmed. Marshall, Ch. J., in delivering the opinion, says: "Where the defendant in the action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest jurisdiction." * * *

In Farley v. Shippen, 1 Wythe's R. 254, the Court of Chancery in Virginia held that it had jurisdiction to enforce a trust in relation to lands lying in North Carolina, the defendants

being amenable to its process. To the same effect is the case of Guerrant v. Fowler, 1 Hen. & M. 5. So, also, Hughes v. Hall, 5 Munf. 431.

The current of decision in this state, upholding the jurisdiction of our courts upon this question, has been uniform. The jurisdiction of the court was distinctly affirmed by Chancellor Sanford, in Ward v. Arredondo, Hop. R. 213. In that case, the land was in the state of Florida, and the parties in this state; and the bill was filed to cancel a deed and restrain an agent of the grantor from parting with it. I am unaware that the authority of this case has ever been questioned in this state; on the contrary, it has been frequently affirmed. Mead v. Merritt & Peck, 2 Paige, 402; Mitchell v. Bunch, 2 Id. 606; Sutphen v. Fowler, 9 Id. 280; Shattuck v. Cassidy & Smith, 3 Edw. 152; De Klyn v. Watkins et al., 3 Sand. Ch. R. 185; Newton v. Bronson, 3 Kern. 587.

These cases must be held to establish the jurisdiction of the Supreme Court, in the present case, on an impregnable basis, and that the court, having jurisdiction of the party in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title to them in the state of Illinois.

DILLON v. HELLER.

39 Kan. 599, 18 Pac. 693. 1888.

This was an action brought in the District Court of Harper county by Martin Heller against John H. Dillon to quiet the title to lot No. 10, block No. 33, in the city of Anthony, in said county. Personal service of summons could not be obtained on the defendant in Kansas, hence the plaintiff filed an affidavit for service of summons by publication, which reads as follows:

"STATE OF KANSAS, HARPER COUNTY, ss.—In the District Court of the 19th Judicial District, in Harper County, Kan.

"Martin Heller, Plaintiff, vs. John H. Dillon, Defendant—Affidavit.

"Isaac A. Love, being first duly sworn, says that he is attorney for the plaintiff herein; that the service of summons herein

cannot be made upon the defendant in this state; that the defendant is a non-resident of this state, and that the above action is in relation to real estate situated within the state, in which the defendant claims an interest, and that the relief demanded is to exclude the defendant from any interest therein.

"ISAAC A. LOVE.

"Subscribed and sworn to before me this 25th day of August, 1886.

[Seal] "F. O. MOTT, Clerk District Court."

The notice to the defendant was duly published for three consecutive weeks in the Anthony Republican, a weekly newspaper printed and published in the city of Anthony, in said county, and having a general circulation in the county. Said notice reads as follows:

"*Notice.*

"STATE OF KANSAS, HARPER COUNTY, ss.—In the District Court of the 19th Judicial District, in Harper County, Kan.

"Martin Heller, Plaintiff, vs. John H. Dillon, Defendant—Notice to Non-Resident.

"The defendant, John H. Dillon, is hereby notified that he has been sued by the plaintiff in the above-entitled action in the above court, and that he must answer the petition of the plaintiff in said action filed, on or before the 11th day of October, 1866, or the same will be taken as true, and judgment will be rendered, quieting the title in the plaintiff to the following described real estate, situated in Harper county, state of Kansas, to-wit, lot ten, (10,) in block No. thirty-three, (33,) in the city of Anthony. Witness my hand, and the seal of said court, this ——— day of August, 1886.

[Seal] "F. O. MOTT, Clerk District Court.

"ISAAC A. LOVE, Attorney for Plaintiff."

The defendant made a special appearance, and moved the court to quash the service by publication for the following reasons, to-wit: "First, that the same does not run in the name of the state of Kansas; second, that the court cannot acquire jurisdiction of the person in these cases to quiet title by such service, to-wit, service by publication." This motion was overruled; and, the defendant making no further appearance in the case, the court rendered judgment as upon a default in favor

of the plaintiff and against the defendant, quieting the plaintiff's title to the above-mentioned real estate, and for costs; and the defendant, as plaintiff in error, brings the case to this court for review.

VALENTINE, J. (after stating the facts as above). The plaintiff in error, who was defendant below, claims that the court below erred in the following particulars, and for the following reasons, to-wit: "First, that service of summons by publication in actions to quiet title is not sufficient to give the court jurisdiction of the party defendant; second, that the court, not having jurisdiction of the party defendant, cannot pronounce judgment in the matter. While the plaintiff in error does not in terms claim that a court cannot, in any case where the defendant is a non-resident and out of the state, obtain jurisdiction to hear and determine the case by virtue of a service of summons only by publication, yet, such is the result of his argument; and, in support of such argument, he cites a number of authorities, the principal of which is the case of Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. Rep. 586. We do not think, however, that the authorities cited go to the extent claimed for them. Of course, a court cannot obtain jurisdiction of the person of a non-resident defendant by means only of a service of summons by publication; nor can a court obtain jurisdiction of the person of any person who is a non-resident, and out of the state, by any kind of service, or by any kind of process or notice, for the jurisdiction of the courts of any sovereignty can never extend beyond the domain of the sovereignty which creates them. Amsbaugh v. Bank, 33 Kan. 100, 105, 5 Pac. Rep. 384. No court in Kansas can compel a non-resident defendant out of the state to come within its territorial boundaries, or to submit himself to its jurisdiction, or to do or perform any other act or thing; but this lack of power on the part of the court does not depend upon the character of the service of process made upon the defendant, but it arises from the well-established doctrine that the jurisdiction of one sovereignty (through its courts or otherwise) cannot extend into the territorial boundaries of another sovereignty. Therefore, for the purposes of this case, it will be admitted that the court below did not have jurisdiction of the person of the defendant below (plaintiff in error). But that does not settle this contro-

versy. The court below had jurisdiction of something. It had jurisdiction of the plaintiff below, and it had jurisdiction of the subject-matter of the action. This latter proposition, however, is questioned. Jurisdiction is of two kinds: jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction in personam and jurisdiction in rem. And jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. Now, it may be admitted, for the purposes of this case, and is admitted, that the old equitable action to quiet title to real estate was purely an action in personam; and, indeed, it will be admitted that originally every action in equity was purely an action in personam. But such is not the case under the statutes of this state, and such is not the case with respect to the present action. The present action is purely a statutory action, brought by the plaintiff under § 594 of the Civil Code, and is one of a kind of actions which can be maintained only by a person who is in the actual possession of the property in controversy, either by himself or tenant. Where personal service of summons can be obtained in such an action, the action is one in personam as well as in rem; but, where service of summons can be had only by publication, then the action is one only in rem. The present action is one only in rem; and the court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the state any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the state belonging to non-resident owners out of the state, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the state, or to the courts of the state, and where the most urgent public policy and justice require that the state and its courts should assume jurisdiction over such property? Power of this kind has always been exercised, not only in Kansas, but in all the other states. Lands of non-resident owners, as well as of resident owners, are taxed, and sold for the taxes; and the owners may thereby be totally deprived of such lands, although no notice is ever given to such

owners except a notice by publication, or some other notice of no greater value, force, or efficacy. Beebe v. Doster, 36 Kan. 666, 675-677, 14 Pac. Rep. 150. Mortgage liens, mechanics' liens, material-men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property which they may have in Kansas; and the jurisdiction to hear and determine, in this kind of cases, may be obtained wholly and entirely by publication. Gillespie v. Thomas, 23 Kan. 138; Walkenhorst v. Lewis, 24 Kan. 420; Rowe v. Palmer, 29 Kan. 337; Venable v. Dutch, 37 Kan. 515, 519, 15 Pac. Rep. 520. All the states, by proper statutes, authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done, where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its powers and authority are limited by the Constitution and laws of the United States; and, within the Constitution and laws of the United States, the courts of Kansas may have all the jurisdiction over all persons and things within the state which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of anything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service.

In the present case, the plaintiff resides within the state of Kansas, and he virtually surrendered jurisdiction of himself to the court below when he commenced this action. He is in the actual possession of the property in controversy, and, being in the actual possession thereof, he also, in effect, surrendered jurisdiction thereof to the court when he brought his action, and as much jurisdiction thereof as any court in any action could obtain by virtue of a seizure of the property by its own officers;

and service of summons by publication, as authorized by law, was afterwards had in this case; and this gave the court the power to hear and determine the case, and to render a judgment therein, and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy. Jurisdiction is simply the power to hear and determine, and to enforce the judgment, order, or decree made or rendered on such hearing. Nothing can be lacking in the present case. The court had the power to hear and determine the case, the power to render the judgment prayed for, which was to quiet the plaintiff's title and possession; and he was in the actual possession of the property; and, as the property was and is within the territorial jurisdiction of the court, there would seem to be no good reason why the judgment is not valid, and why the court cannot enforce such judgment. It is said in the case of Hart v. Sansom, 110 U. S. 155, 3 Sup. Ct. Rep. 586, that "the courts of the state may, perhaps, feel bound to give effect to the service made as directed by its statutes." And, also: "It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." Now, certainly, no court would feel bound to give effect to a statute unless the court believed the statute to be valid and an existing law; and if the state may rightfully provide by statute that any one of its courts may authorize a trustee to make or cancel a deed executed by or for a non-resident, or in which a non-resident is interested, then the state could unquestionably authorize the same court, by its judgment alone, to cancel, or, in effect, to create, the deed; for the trustee appointed by the court is the mere creature of the court, and can take no power, nor exercise any power, except such as emanates from the court itself. There can certainly be no necessity for the circuitous, indirect, and cumbrous mode of appointing a trustee to do a thing when the judgment of the court may itself answer the entire purpose. See Civil Code, § 400. If jurisdiction cannot be given to the court to render such a judgment, then, a fortiori, jurisdiction could not be given to the court to appoint a trustee for such a purpose. A court without jurisdiction cannot do anything,—not even to

appoint a trustee. We think the court below had ample jurisdiction in the present case. We think a court may, in any case where the statutes authorize the same, obtain jurisdiction upon service by publication concerning anything present and existing within the boundaries of the state. To hold otherwise would unsettle and overturn a great many titles to land in this state,—titles which have long been acquiesced in, and supposed to be good and valid, and to be settled and established by the statutes and by numerous judicial decisions. And to hold otherwise would also do great injustice to innocent purchasers of lands who hold the same under such titles. We think such titles are good.

The judgment of the court below will be affirmed. All the justices concurring.

PART I

EQUITABLE REMEDIES

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS.

Adequacy of Remedy at Law—Chattel Contracts—Exceptional Cases.

THE EQUITABLE GAS LIGHT COMPANY v. THE BALTIMORE COAL TAR AND MANUFACTURING COMPANY.

63 Maryland 285. 1884.

ALVEY, C. J., delivered the opinion of the court. This is a bill filed by the appellee, the plaintiff below, for an injunction, and for specific performance of a contract set forth in the bill. The injunction was granted, and, upon answer filed by the defendant, an appeal was taken from the order granting the injunction. We are to enquire therefore whether, upon the allegations of the bill, assuming that they will be supported by proof, there is such case stated as justified the court in granting the injunction? And this depends upon the antecedent question whether, upon proof of the allegations of the bill, there will be such case presented as will justify the court in decreeing specific performance of the contract alleged.

The contract alleged in the bill is, that on the 14th of February, 1882, the defendant agreed to sell to and allow the plaintiff to take away all the coal-tar that might be produced at the defendant's gas-works in the city of Baltimore, for and during the term of five years from that date, for a stipulated price per gross ton, payable four months from the 20th of each month. * * * It is then alleged, that in June, 1884, the defendant gave notice to the plaintiff that the latter would not be allowed to take away any more of the coal-tar after the last day of that month; and the bill then proceeds to charge, that

if the defendant is permitted to evade or escape from the obligation of its contract, and be allowed to sell and deliver the coal-tar to other parties, the plaintiff will thereby suffer great and irreparable damage, for which no adequate redress or remedy could be obtained at law, for the reason that the plaintiff is engaged in the manufacturing of certain articles for which the coal-tar is a necessary material, and relying upon the contract with the defendant, the plaintiff has contracted for the sale, in advance, of all the products that can be made by it from the coal-tar to be obtained from the defendant's gas-works for the next twelve months; and as a supply of such coal-tar cannot be otherwise obtained in the city of Baltimore, it would be impossible for the plaintiff to fulfill its contracts otherwise than by purchasing the coal-tar in other and distant cities, and transporting the same at great expense and loss, the amount of which it is impossible to estimate in advance, etc. * * *

The question then arises, whether the contract is of a nature that a court of equity will specifically enforce it; for it seems to be a well-settled general rule that the court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform. In such case the party injured by the breach of the contract is left to his remedy at law. Fothergill v. Rowland, L. R. 17 Eq. 132.

It is certainly a well-recognized general principle by courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not however because of the nature of the property, the subject-matter of the contract, but because damages at law, calculated on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor. 2 Sto. Eq., § 717; Sullivan v. Tuck, 1 Md. Ch. Dec. 63. But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy at law in the particular case, or the special and peculiar nature and value of the subject-matter of the contract. In the 2d vol. of Story's Equity, §§ 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed, with reference to all but the very recent cases. And among the cases forming exceptions to the general rule, there is one

stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by installments, of which specific performance was decreed; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate compensation in damages at law; for the profits upon the contract, being dependent upon future events, could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of Buxton v. Lister, 3 Atk. 385, and repeated by Judge Story, as an apt illustration; a man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, § 15, p. 20, states it as a well-settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plaintiff could not be indemnified by any such amount of damages as he could recover at law.

In this case the allegation is that the coal-tar contracted to be supplied by the defendant is indispensable to the business of the plaintiff, and that the latter cannot otherwise obtain a supply in the city of Baltimore, and that if the defendant were permitted to withhold the supply, the plaintiff would be subjected to great additional expense and labor in procuring the material from distant cities. This gives the material a special and peculiar value to the plaintiff in Baltimore, and makes it specially inequitable in the defendant to refuse to perform its agreement. As was said by the Chancellor in Sullivan v. Tuck, supra, it would be impossible, or at all events extremely difficult, for a court of law to give the plaintiff adequate damages, that is, to determine and measure the amount of damages which the plaintiff may sustain in the future, by the refusal to allow it to take away the material from the defendant's works, in fulfillment of the contract. The contract, therefore, according to the allegations of the bill, being one of a nature proper to be specifically enforced, the court will interfere by injunc-

tion to restrain the defendant from otherwise disposing of the subject-matter of the contract, though the negative obligation not to otherwise dispose of the material may be only implied from the positive terms of the agreement. This principle is abundantly established by repeated decisions. Wolverhampton, etc., R. Co. v. London & N. W. R. Co., L. R., 16 Eq. 433, 440; DeMattos v. Gibson, 4 De G. & J. 276; LeBlanch v. Granger, 33 Beav. 287; Holroyd v. Marshall, 10 Ho. L. Cas. 191, 210, per Lord Chancellor Westbury. We shall therefore affirm the order appealed from, with costs in this court to the appellee.

Order affirmed, and cause remanded.

Contracts for Personal Services, Building Contracts, Etc.

BECK v. ALLISON.

56 N. Y. 366, 15 Am. Rep. 430. 1874.

GROVER, J. This action was brought by the plaintiffs as assignees of a lease made by the defendant of the premises known as 44 Vesey Street, in the city of New York, for two years, containing a provision for a renewal, at the option of the lessees, for a further term of three years, by giving the lessor notice as therein provided, which notice had been given as therein provided, for the specific performance of an agreement made by the lessor to repair damages caused by fire. The lease provided that all other repairs were to be made by the lessees, and the case shows that this agreement of the lessor was interlined after the preparation, but before the execution of the lease. The case shows that the premises were nearly destroyed by fire while in the occupation of the plaintiffs, under the lease, so as substantially to require rebuilding; but the trial judge found that they could be repaired, and the defendant must, after affirmance of the judgment by the General Term, be held in this court concluded by this finding. The judge further found that a reasonable time for doing the requisite repairs was four months.

The question is thus presented whether equity will enforce the specific performance of an agreement for making repairs of this character. The learned chief justice who gave the opinion of the General Term, after an elaborate and learned ex-

amination of the English authorities, arrived at the conclusion, that equity would specifically enforce agreements for making repairs. In this, he differs from Judge Story, who, after an examination and citation of some of the leading cases relied upon by the learned judge, adopts precisely an opposite conclusion. Story's Equity, 2d vol., §§ 726, 727. The accuracy of the conclusion of Judge Story is strongly corroborated by the fact, that in this State, and so far as I am aware, in this country, no court of equity has ever attempted the exercise of any such power. The same conclusion is substantially adopted by a learned English author of a work upon this particular branch of equity jurisprudence, who refers to most of the cases relied upon by the learned judge. Fry on Specific Performance, 19, § 48. I shall refer to only a few of the cases cited by the judge, although I have examined nearly all. City of London v. Nash, 1 Vesey, 11, decided by Lord Hardwicke, is much relied upon in the opinion. In this case the chancellor stated that equity would enforce the performance of a building contract, for the reason that it was an entire thing, but not a contract for repairs. While I am unable to see, if the former is thus enforced, why the latter should not be, for the reason that the former would be attended by about the same difficulties as the latter, and a legal remedy would be equally applicable to both, yet the case is authority against the conclusion of the General Term in the present case, as this is an agreement for making repairs. It may be further remarked, that a specific performance of the contract to rebuild was not decreed, the chancellor being of opinion that that would be inequitable under the circumstances, and the party injured by the breach of the contract was left to his legal remedy for the recovery of damages. The judgment given is no authority for enforcing the specific performance of contracts to build. In the subsequent case of Lucas v. Commerford, 3 Brown, 166, it was expressly held by Chancellor Thurlow, that there could not be a decree to rebuild, as the court could no more undertake the conduct of a rebuilding than of a repair. I think the soundness of the reason given a full answer to the criticism of this chancellor contained in the opinion with a view to impair the authority of the judgment given in this case. In Rayner v. Stone, 2 Eden, 128, a demurrer to a bill for the specific performance of convenants contained

in a lease to repair hedges and the mansion house, was sustained by Lord Northington. Among the reasons assigned for the judgment, was, that the court had no officer to see to the performance, which the chancellor said was to him very strong. He asks how can a master judge of repairs in husbandry, etc. He adds that it is said that this is an equitable right, and that it was insisted that he should put the plaintiff in a better state than what he could be at law, but the court had no jurisdiction to strip the defendant of the right to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that the court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Worthington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country. It was for these reasons that the court in the South Wales R. Co. v. Whythe, 5 DeG., McN. & Gord. 880, refused to decree the specific performance of a contract to construct a branch railway. The case enforcing the specific performance of an agreement made by a railway company with a land owner, to construct an arch

under their road for his use, does not militate against this doctrine. Damages in an action, at law, would not, in such a case, afford adequate redress. The same may be said of the case enforcing a contract for the construction of a wharf, etc. The want of an adequate remedy at law has always been regarded as a proper ground for sustaining a bill in equity. See Wilson v. Furness R. Co., 9 Equity Cases, 28. What was said by Lord Hardwicke in Rock v. Worth, 1 Vesey Sr. 460, was intended to apply to the particular facts of that case, which related to questions as to the rights of tenant in tail and the reversioner which could not well be protected in a legal action.

But I do not deem it necessary further to pursue the investigation. As I understand the English cases, the power of enforcing the specific performance of contracts for repairs is not now exercised by courts of equity there, and there is no authority for its exercise by the courts of this State. This being so, a court of equity had no jurisdiction, as such, of the action.

The judgment appealed from must be reversed, and a new trial ordered. All concur.

Judgment reversed.

Hardship.

WILLARD v. TAYLOE.

8 Wallace 557 (U. S.). 1869.

Appeal from the Supreme Court of the District of Columbia.

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. In December, 1861, the banks throughout the country suspended payments in specie,

and in 1862 and 1863, the federal government issued some hundred millions of notes, to be used as money, and which Congress declared should be a tender in the payment of debts.

Before the option expired the complainant elected to buy the property and tendered the amount of the first instalment of the purchase money in legal tender notes. The defendant refused to accept these, insisting upon payment in gold.

FIELD, J., after stating the facts of the case, delivered the opinion of the court as follows:—

The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. * * *

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine, 12 Vesey, Jr. 332, "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under the circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it."

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In Joynes v. Statham, 3 Atkyn, 388, Lord Hardwicke said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in Underwood v. Hitchcox, 1 Vesey, Sen. 279, the same great judge said, in

refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in Seymour v. Delancy, 6 Johnson's Chancery, 222, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in Godwin v. Collins, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of the City of London v. Nash, 1 Vesey, Sen. 12, the defendant, a lessee, had covenanted to rebuild some houses, but, instead of doing this, he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." * * *

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the estab-

lished doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in Davis v. Hone, 2 Schoale & Lefroy, 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first instalment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts. * * *

The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court

of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The act of Congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before, and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the act declaring them a legal tender had been sustained by nearly every State court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances. * * *

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it

strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity. * * *

The Chief Justice, with Nelson, J., concurred in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.

Part Performance of Oral Contracts.

GALLAGHER v. GALLAGHER.

31 W. Va. 9, 5 S. E. 297. 1888.

SNYDER, J. Suit in equity brought in the circuit court of Mason county in July, 1883, by Michael Gallagher against Hugh Gallagher and others to compel the specific performance of an alleged parol contract for the sale of real estate. The defendants answered the bill. Depositions and exhibits were filed on which the cause was heard, and on February 17, 1885, the court entered a final decree ordering the specific execution of said contract, and directing a conveyance of the real estate by the defendant, Hugh Gallagher, to the plaintiff. From this decree said defendant has obtained this appeal. The plaintiff's bill alleges that some time in the year 1878 the appellant, Hugh Gallagher, who is the father of the plaintiff, purchased a house and lot in Hartford City, Mason county, which is fully described, from the Hartford City Coal & Salt Co., and paid a part of the purchase money thereon, but finding he would be unable to pay the balance, agreed with the plaintiff that if he would pay said balance of the purchase money the deed therefore should be made by said company to him, the plaintiff, thereby selling his equitable interest in said property to the plaintiff; that in

pursuance of said agreement the plaintiff took possession of the property, made valuable improvements upon it, and paid to said company about $500 in full of the balance due on the original purchase; that said company is ready and willing to make the plaintiff a deed for the property, but the appellant refuses to permit it to do so. The appellant, in his answer, positively denies that he ever sold said property to the plaintiff, or made any such contract with him as is alleged in the bill; he denies that the plaintiff was ever put in possession of the property, or that he made any improvements thereon; he also denies that the plaintiff ever had any interest, legal or equitable, in the property, or that he paid $500 on the purchase thereof. The proofs in the cause show that in the year 1859 or 1860 the appellant purchased from said company a part of the lot in controversy at the price of $100; that he was put in possession of the same, and built a house and made other improvements thereon, and has lived in said house ever since; that soon after the first purchase he agreed to purchase the residue of the lot, constituting the whole of lots Nos. 23 and 24 of said town, at the price also of $100, making $200 for the whole; that before the year 1878 he had paid in full for said first purchase, but still owed the price of the second purchase with its accumulated interest; that in the fall of 1878, about the time his son, the plaintiff, became of age, he made an arrangement with the president of said company, by which his son should work for it, and that the balance due on the property was to be taken out of the son's wages. The books of the company show that from March, 1879, to October, 1880, the plaintiff's wages are credited with the aggregate sum of $300, on account of this property. At the time these wages were earned the father and son were both living together in the house on the property, as they had been before and after the alleged purchase by the son was made. The father was engaged in cultivating some rented land, raising corn and hogs, and butchering.

But if it were admitted not only that there was a contract of sale, but also that the purchaser had paid the purchase money, still the plaintiff would not be entitled to relief in this suit. The principles upon which courts of equity will avoid the statute of frauds on the ground of part performance of a parol contract for the sale of land are now as well settled as any of the

acknowledged doctrines of equity jurisprudence. To entitle a party to relief in such cases it must appear—First, that the contract relied on is certain and definite in its terms; second, the acts proved in part performance must refer to, result from, or be made in pursuance of, the contract proved; and, third, the contract must have been so far executed that a refusal of full execution would operate a fraud upon the purchaser, and place him in a situation which does not lie in compensation. Campbell v. Fetterman, 20 W. Va. 398, 403; Wright v. Puckett, 22 Grat. 370; 1 Lead. Cas. Eq. (2d Amer. Ed.) top pp. 557-574. It is now settled that the payment by the purchaser to the vendor of the whole or a part, whether substantial or unsubstantial, of the purchase money is not an act of part performance which will take the parol contract out of the statute. Jackson v. Cutright, 5 Munf. 308; Fry, Spec. Perf. § 403; 2 Story, Eq. Jur. § 760. The fraud which will entitle the purchaser to a specific performance is that which consists in setting up the statute against the performance after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the statute of frauds; therefore, a purchaser seeking the performance of such agreement must be able to show clearly not only the terms of the contract, but also such acts and conduct of the vendor as a court would hold to amount to a representation that he proposed to stand by his agreement, and not avail himself of the statute to escape its performance; and also that the purchaser, in reliance on this representation, has proceeded, either in performance or pursuance of this contract, to so far alter his position as to incur "an unjust and unconscientious injury and loss," in case the vendor is permitted after all to rely upon the statutory defense. Browne, St. Frauds, § 457a; Glass v. Hulbert, 102 Mass. 34; Swain v. Seamens, 9 Wall. 254. From this it is apparent that the payment of the purchase

money is not such part performance as would entitle the purchaser to specific execution, because the money may be recovered back at law, and the parties be thus restored to their original position; and therefore, it does not put the purchaser in such a position that he will suffer "an unjust and unconscientious injury and loss" if the contract is not enforced. 2 Story, Eq. Jur. § 761. Possession is an important element in the enforcement of such contracts. Possession alone will, under some circumstances, entitle the purchaser to a decree for specific performance. Harris v. Crenshaw, 3 Rand. 14; 2 Story, Eq. Jur. § 761. In all cases in which possession, either as delivered by the vendor or assumed by the purchaser, is relied upon, it must appear to be a notorious and exclusive possession of the land claimed, and to have been delivered or assumed in pursuance of the contract alleged, and so retained or continued. Where the purchaser moves upon the premises and remains there in company with the previous occupant, not as the ostensible and exclusive proprietor, or where the metes and bounds of the land alleged to be purchased are not fixed and recognized and the purchaser occupies it in common with adjacent land of his own, such possession, as an act of part performance, will not be sufficient to entitle the purchaser to specific performance. Fry v. Shepler, 7 Pa. St. 91; Haslet v. Haslet, 6 Watts, 464; Browne, St. Frauds, §§ 467-486. It is always regarded as strongly confirmatory of the right of a purchaser seeking the specific execution of a verbal contract for an estate in land that he has proceeded, upon the faith of the contract and with a knowledge of the vendor, to expend money on the improvement of the land. But the improvements relied upon must be of a character permanently beneficial to the land and involving a sacrifice to the purchaser who made them. Although the improvements are required to be beneficial to the land, a court of equity will not inquire whether the expenditures have been judiciously or injudiciously made, or whether the money has been well or ill laid out. Davenport v. Mason, 15 Mass. 85; Whitehead v. Brockhurst, 1 Brown Ch. 417. It must appear, however, that the loss of his improvements would be a sacrifice to the purchaser. If, therefore, he had gained more by the possession and use of the land than he has lost by his improvements, or if he has been in fact fully compensated for the im-

provements, they will not be available to him as a ground for specific execution. Browne, St. Frauds, §§ 487-491.

In the case at bar, the plaintiff has wholly failed to prove either that he ever had the exclusive possession of the property in controversy, or that he made any permanent improvements upon it. In respect to these matters, the plaintiff, in answer to the question, "State how the defendant, Hugh Gallagher, was living there after you took possession of the property," testifies, "We were both living there together on what I made until I became of age. After I became of age, the contract for the land was made, and we have lived in the same condition ever since up to October 10, 1882. I went off and boarded for a couple of months before I was married, and then I went there to live. He lived some three or four months with us, and then to himself, in the same house." And in reply to the question as to what improvements he had put upon the property since he took possession, the plaintiff testifies as follows: "I paid for the stripping the doors and for locks for same and built a well frame on the premises and put a bucket in the well or to a rope." This is the only evidence in the record in regard to the character of the possession of the property by the plaintiff and of the improvements made thereon by him. It clearly shows that the appellant never surrendered the possession, and that the plaintiff never had the exclusive possession as purchaser or otherwise. The alleged improvements were merely repairs of the most trifling character and not improvements at all. According to the principles hereinbefore announced and the authorities cited, the plaintiff has had no such possession of the property or made such improvements thereon as would entitle him to a specific execution of his alleged contract of purchase, even if he had clearly shown, as he has not, that a contract of sale had been actually made, and in pursuance of it he had paid the purchase money in full; for the reason that he has an ample remedy at law to recover back his purchase money, and thus he could be fully compensated and restored to his original position. I am therefore of opinion that the decree of the circuit court should be reversed, and the plaintiff's bill dismissed.

JOHNSON, P. J., and GREEN and WOODS, J. J., concurred.

Equitable Easements.

JACKSON ET AL. v. STEVENSON.

156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476. 1892.

BARKER, J. In the year 1853 the city of Boston owned a parcel of land known as the "Arsenal Estate," in the vicinity of the southerly end of the common. The lot was triangular, but truncated at the northerly end towards the common, and contained an area of about 14,000 square feet, bounded on the west by Pleasant street, now known as "Park Square," and on the other side by lands of private owners. The westerly line was about 232 feet in length, and the greatest depth, perpendicular to this line, was about 100 feet, while at the northerly end the depth was about 24 feet. At this time the estates surrounding the common were chiefly used for the more expensive residences. The city caused the land to be divided into eight lots, and sold. The most northerly and southerly lots, numbered, respectively, 1 and 8, were each about 44 feet wide, and each of the other lots 24 feet. The plaintiffs are the owners of lot No. 8, while the defendant owns the lots numbered 4 and 5. The other lots are owned by different persons, all deriving title through separate deeds from the city. In order to provide a general building scheme, and to effect a uniform plan, certain restrictive clauses were inserted by the city in its deeds, intended for the benefit of the lots and of the neighborhood. The fourth restrictive clause provided that "no dwelling house or other building, except the necessary outbuildings, shall be erected or placed on the rear of the said lot." The fifth clause was as follows: "No building which may be erected on the said lot shall be less than three stories high, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling house, apothecary's shop, dry goods store, or grocery store, during the term of twenty years from August 25, 1853." The city conveyed the lots No. 4 and 5 in 1856, and the plaintiffs' lot No. 8 in 1858. All the lots were conveyed by the city before the year 1864, and dwelling houses of substantially uniform design were built which now remain upon lots Nos. 3, 4, 5, 6, 7, and 8.

No objection had been made by the owners of the plaintiffs' estate to any structure erected on any of the lots until this case arose, in 1891. The master finds that since August 25, 1873, there has been a considerable change in the character of the neighborhood, the houses being no longer used as dwellings exclusively, but devoted to a considerable extent to business purposes, and that the neighborhood is now, to all intents and purposes, a business or mercantile one. The defendant, owning property on Carver street abutting on the rear of lot No. 4, and intending to erect a market on Carver street, proposed to build, over the entire rear portion of lot No. 4, a brick structure with a flat roof and raised skylight, for use as a part of and a connection between the ground floor of the building on lot No. 4 and his Carver street property, designed as a store or market, its exact use depending upon future tenants. The plaintiffs, upon ascertaining this, gave notice that they should insist on a compliance with the restrictions; and, this notice being disregarded, brought their bill, alleging that the defendant is about to erect on lot No. 4 a building which is not a necessary outbuilding, and asking that he may be perpetually enjoined from placing on the rear of lots No. 4 or No. 5 any building except necessary outbuildings. The master finds that the proposed structure is a reasonably necessary outbuilding, if, in construing the fourth restriction, the facts that the operation of the fifth restriction has ceased, and that the neighborhood is now used for general business purposes, are to be considered, unless the defendant's intention to use it in part as connection between the Park square and Carver street buildings shows that it can be in no sense an "outbuilding." The plaintiffs except to this part of the master's report, and also to his findings as to structures upon the rear of other lots. The master finds that the proposed structure would cause no appreciable diminution of light or air, nor any perceptible damage to the plaintiffs' estate, beyond the possible technical damage which the law may assume; and that the structures on the rear portions of lots No. 6 and No. 7, which lie between the premises of the parties, are of more considerable importance, as affecting the plaintiffs' premises, than the proposed structure would be.

We assume that when restrictions inserted in the deed of a particular lot are part of a general scheme for the benefit and

improvement of all the lands included in a larger tract, a grantee of any part of the land may, under proper circumstances, enforce them against his neighbor (Whitney v. Railway Co., 11 Gray, 359; Parker v. Nightengale, 6 Allen, 341; Linzee v. Mixer, 101 Mass. 512; Tobey v. Moore, 130 Mass. 448; Beals v. Case, 138 Mass. 138; Payson v. Burnham, 141 Mass. 547, 6 N. E. Rep. 708); and that the restrictions inserted by the city in its deeds were of this nature (Hano v. Bigelow, 155 Mass. 341, 29 N. E. Rep. 628). We also assume that the restrictions, except as expressly limited in duration, were intended to be permanent; and that the structures which the defendant proposed to erect were not "necessary outbuildings," within the meaning of the fourth restriction. Keening v. Ayling, 126 Mass. 404; Sanborn v. Rice, 139 Mass. 387, 397; Ayling v. Kramer, 133 Mass. 12, 14; Hamlen v. Werner, 144 Mass. 396, 11 N. E. Rep. 684. We also assume that an owner having the right to enforce such a restriction, if otherwise entitled to sue in equity, is not obliged to wait until after the objectionable structure has been erected, before bringing his bill (Peek v. Matthews, L. R. 3 Eq. 515); and that relief may be granted, although no actual serious pecuniary damage may have been sustained or is to be expected (Attorney General v. Algonquin Club, 153 Mass. 447, 455, 27 N. E. Rep. 2); and that an owner may neglect to object to infractions of restrictions to some extent, without losing his right to enforce the restrictions when they more clearly and seriously affect him (Linzee v. Mixer, 101 Mass. 512, 531; Payson v. Burnham, 141 Mass. 547, 556, 6 N. E. Rep. 708).

Assuming these points in favor of the plaintiffs, we are nevertheless of the opinion that an injunction should not be granted in the present case. It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than their breach, to enforce them

in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made. Duke of Bedford v. Trustees, 2 Mylne & K. 552; German v. Chapman, 7 Ch. Div. 271, 279; Sayers v. Collyer, 24 Ch. Div. 180, 187; Trustees v. Thacher, 87 N. Y. 311; Starkie v. Richmond, 155 Mass. 188, 29 N. E. Rep. 770. But, as the plaintiffs have no remedy at law against the defendant, the bill should be retained for the purpose of assessing their damages. Upon the master's report they are entitled to some damages, and we do not understand him to find that, upon the view which we have taken, the damages are merely nominal. The case is to be referred to an assessor to report the damages caused to the plaintiffs by the erection of the structures which the defendant has caused to be built since the bringing of the bill, but an injunction is denied.

So ordered.

Destruction of the Premises.

BREWER v. HERBERT.

30 Maryland 301, 96 Am. Dec. 582. 1869.

MILLER, J., delivered the opinion of the court.

After the execution of the written contract for the sale of the house and lot, and before the day fixed for delivery of possession and payment of the first installment of purchase-money, the house was accidentally destroyed by fire, without fault of either party or of the tenant then in possession of the same. The vendor had a fee simple title to the property, and at the proper time, under the contract, offered to deliver possession of the premises in the condition in which they then were. This the vendee refused to receive because of the destruction of the house by fire, and the main question in the case is, can he on this ground successfully resist this application in equity by the vendor for a specific performance of the contract?

In contracts of this kind between private parties the vendee is in equity the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This

doctrine, notwithstanding the dictum in Stent v. Bailis, 2 P. Wms. 219, to the contrary, was plainly announced and settled by the decision of Lord Eldon in Paine v. Meller, 6 Ves. 349, a case very similar in its circumstances to the present, where it was held that if there was no objection to the title of the vendor, or it had been accepted in fact by the vendee before the houses were burned, no solid objection to the bill for specific performance could be founded on the mere effect of the accident before conveyance. "For if the party," says the Lord Chancellor, "by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." This decision has always been regarded as fixing the true equitable rule in such cases. It was recognized by Sir Thomas Plumer in Harford v. Purrier, 1 Madd. Ch. 287, and in Rawlins v. Burgis, 2 Ves. & Bea. 387, and by Lord Chancellor Manners in Revell v. Hussey, 2 Ball & Beatt. 287. From these and other authorities of equal weight announcing the maxim that equity regards as done that which was agreed to be done, is deduced as the established doctrine in equity, that from the time the owner of an estate enters into a binding agreement for its sale he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase-money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance. 1 Sug. on Vend. 228, 388 to 391; 2 Powell on Cont. 69; Dart on Vend. & Purchasers 114 to 118; 2 Story's Eq., § 1212. The contract here is not for a sale at a future day; it does not use in this respect prospective or contingent terms. Its language is, the vendor "has this day sold to" the vendee his house and lot, which clearly imports a binding contract then executed and consummated. By such terms the title in equity passes from the date of the contract, and if there were nothing else in it there would be no room for argument, for it would be impossible to withdraw the case from the operation of the rule above stated.

But it has been earnestly and strenuously urged by the appellant's counsel that as the contract contains an agreement by

the vendor to deliver possession of the house and lot to the vendee on the first of April, 1866, the destruction of the house by fire before that period rendered performance by the vendor of this part of the contract impossible, and he cannot, therefore, either in law or equity ask the vendee to perform his part of it; and this circumstance, it is insisted, distinguishes the case from those cited, and prevents it from falling within the principle established by them. Let us test the soundness of this argument. The vendee knew before and at the time of the contract there was a tenant in possession, whose term would not expire until the first of April, and the first installment of the purchase-money is made payable on, and interest on the deferred payments runs from, that day. The subject matter of sale is realty —a lot of ground with a house upon it, described as a house and lot. The agreement as to delivery is not like the usual covenant by a tenant in a lease, to deliver in as good condition and repair as when the contract was made. There is also no difficulty about delivery, except that the premises were not, as to the buildings upon them, in the same condition as at the date of the contract. The question then resolves itself into this: Does the fact of the insertion into a contract like the present for the sale of real estate of an agreement to deliver possession at a future day make any difference in the application of the rule? It is true it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to, but they explicitly say it is the passing of the title in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits. To this, as we have seen, a conveyance is not necessary, nor is payment of the purchase-money or any part of it; for in Hampson v. Edelen, 2 H. & J. 66, this court has decided that "a contract for land bona fide made for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time." Neither can possession nor delivery of possession be necessary, for if the contract had been silent on this subject the vendor would have had the right to retain possession at least until the first of April, when the first installment of the purchase-money was payable, and if the vendee had obtained possession before, he would have been restrained in equity from exercising any

acts of ownership prejudicial to the inheritance, Crockford v. Alexander, 15 Ves. 138; Reed v. Lukens, 44 Penn. Rep. 202; and yet the equitable title would all the while have been in him, subject to his disposition by deed or will, and liable for his debts. If, then, in the absence of a stipulation to deliver at a future day there is an implied right in the vendor to retain possession until that period, and this would make no difference as to the liability of the vendee for an intermediate loss, how can the insertion of such a stipulation have in equity any different effect? The whole foundation of this doctrine of equity is that the equitable title and interest passes by the contract of sale, and from the time of its execution, and it contemplates delivery of possession as well as payment of purchase-money, and a conveyance at a future period. * * * In sales of personal property, delivery of the goods sold is not necessary to pass the title as between the parties, where the Statute of Frauds has been gratified by giving something in earnest, or payment of the whole or part of the purchase-money, or a sufficient note or memorandum in writing of the bargain; and in such case the property is at the buyer's risk before delivery. Franklin & Armfield v. Long, 7 G. & J. 418. And even where the seller remaining in actual possession agrees to deliver the property at a particular place, and it is destroyed by fire before such delivery, the loss will fall on the purchaser. Terry v. Wheeler, 25 N. Y. Rep. 520. Where sales are made under authority of a court the contract is not regarded as consummated until it has received the court's sanction or ratification, and, therefore, any loss happening before confirmation falls upon the vendor. Ex parte Minor, 11 Ves. 559; Wagner & Marshall v. Cohen, 6 Gill 102. But where a loss occurs after confirmation by which the contract is consummated it falls upon the vendee, even though no purchase-money has been paid, and the vendor remains in possession. This was expressly decided in Robertson v. Skelton, 12 Beav. 260, where Lord Langdale also said: "In equity the estate belongs to the purchaser from the date of the order to confirm the report, and the right of possession belongs to the vendor till the purchase-money, for which it is security, has been paid." Again, if we look to the contract itself, and gather therefrom the intent of the parties, it is clear from the language used, their intention was that the equitable title and in-

terest should pass from the day of its execution. Upon this point its terms are too positive and explicit to admit of doubt. Delivery of possession and payment of purchase-money were postponed to a future day for the convenience of each party respectively, and we cannot construe the agreement to deliver into a condition that the contract shall be void if there is any change in the state or value of the property on the day of delivery, nor interpolate any such words into the instrument. We are, therefore, constrained to hold the argument founded on this delivery clause to be unavailing to the appellant.

Decree affirmed.

CHAPTER III.

INJUNCTIONS.

Trespass.

WHEELOCK v. NOONAN.

108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405. 1888.

FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots, in the upper part of the city of New York, a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of the plaintiff the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of 14 to 18 feet. This conduct was a clear abuse of the license, and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct, and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land. The court found as matter of law from these facts that the original permission given did not justify what was done, either as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring, and the demand for the removal of the rock, the defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief; and awarded judgment

requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court.

The sole question upon this appeal is whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper since there was an adequate remedy at law. It is now said that the remedy was at law, that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way. Beach v. Crain, 2 N. Y. 97. And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. Rep. 536, demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present, would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages, and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong

make of himself in effect a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. . He is liable to be sued every day, die de diem, for the renewed damages following from the continuance of the trespass; and while, ordinarily, there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The courts have observed that peculiarity of the case, and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions. For reasons of this character it has very often been held that while, ordinarily, courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the Murdock Case, supra, and the rule deemed perfectly settled. That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference, as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the Uline Case. Bowyer v. Cook, 4 Man., G. & S. 236; Holmes v. Wilson, 10 Adol. & E. 503. In one stumps and stakes had been left on plaintiff's land and in the other buttresses to support a road; in each an action of trespass had been brought, and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained,—so that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law; but that rule has its exceptions. Railroad Co. v. Railroad Co.,

86 N. Y. 128. Where the facts are in doubt, and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction. In Avery v. Railroad Co., 106 N. Y. 142, 12 N. E. Rep. 619, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked: those of a continuing trespass, the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

(All concur, except RUGER, C. J., not voting.)

Nuisance—Balancing of Injuries.

HENNESSY v. CARMONY ET UX.

50 N. J. Eq. 616, 25 Atl. 374. 1892.

PITNEY, V. C. The object of the bill is to restrain a private nuisance. The complainant is the owner of a small lot of land, about 18 feet front and rear by about 96 feet deep, in the city of Camden, fronting on the west side of South Eighth street, about midway between Spruce street on the north and Cherry street on the south. Upon this lot is situated a small dwelling house, composed of a main or front part of brick, about 15 feet front by 30 feet deep, two stories high, leaving a passageway of 3 feet on the northerly side, and having a wooden extension or kitchen about 10 by 35 feet, two stories high, in the rear. The rear of this structure is 31½ feet from the rear line of the lot. The ground lying to the north and west of this lot is owned by the defendants, or one of them, and is used for a dye works

for coloring cotton and other materials. In the process of dyeing, it, of course, becomes necessary to dry those materials, and in order to hasten this process use is made of two machines, called in the evidence "whizzers," into which the wet material is placed, and which, by being revolved at great speed, drive out the water by centrifugal force. These machines are driven by two small engines attached to them directly, without intermediate gearing, so that the engines must make the same number of revolutions as do the whizzers, and the more rapid the revolution, the more rapid the process of drying. The principal subject of litigation was as to the effect upon the complainant's premises of these machines.

The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country such recovery must result in giving the wrongdoer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely. See Ross v. Butler, 19 N. J. Eq. 302. Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "*de minimis*," "balance of injury," and "discretion" doctrine. It has been said and held on some occasions that, where the injury to the complainant by the continuance of the nuisance is small, and the injury to the defendant by its discontinuance is great, the court will consider that circumstance, and, if the balance is greatly against the complainant, will, in the exercise of a sound discretion, refuse the injunction, and leave the complainant to his remedy at law. As instances in which this notion has been advanced in this state may be cited Quackenbush v. Van Riper, 3 N. J. Eq. 350; Vanwinkle v. Curtis, Id. 422; Railroad

Co. v. Prudden, 20 N. J. Eq. 530,—in the Court of Errors and Appeals; and in the later case of Demarest v. Hardham, 34 N. J. Eq. 469. The two cases in 3 N. J. Eq., as well as Railroad Co. v. Prudden, were instances of interlocutory applications, and distinguishable on that ground; and, further, in Railroad Co. v. Prudden, the injunction was dissolved on the express ground that the complainant's right was not clear.

With regard to the insignificancy of the injury to the complainant, it seems to me it cannot be taken into account if it be appreciable, and such as would clearly entitle him to damages at law. That consideration was urged and overruled, and with it, as I think, the "balance of injury and convenience" notion above stated, by the Court of Error and Appeals in Higgins v. Water Co., 36 N. J. Eq. 538, at 541, which is the latest expression by that court on this subject. At page 544 the learned chief justice deals with it, and finally disposes of the doctrine that in such cases the court will consider and balance the conveniences, and, if that balance be greatly against complainant, leave him to his remedy at law by repeated suits for damages. He uses this language: "Nor, under such circumstances, can a court of equity rightly withhold its hand on the ground of any supposed inconvenience to those who are the customers of this company. In a similar situation the English chancellor refused to listen to such an appeal. Such an appeal was made in the case of Broadbent v. Imperial Gas Co., 7 DeGex, M. & G. 436. The complaint was that vegetables growing in the market garden of the complainant were injured by the gas of that company, and, when the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account this court would not exercise its power to restrain the manufacture of the gas, Lord Cranworth uses this strong language. He says: 'If it should turn out that this company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on.' He further remarks: 'But unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only

to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the vice chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas.'" This seems to me to settle the rule in this state.

The case of Broadbent v. Gas Co., so cited by the learned chief justice, was affirmed on appeal, as reported in 7 H. L. Cas. 601. At page 615, Lord Kingsdown uses this language: "It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that, in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the only inconvenience to which the plaintiff in the suit will be subjected is the inconvenience of the trifling damage it is said (but, be it trifling or large, makes no difference in principle) that he may sustain from time to time, for which he may recover compensation by action." In this case there had been an action at law brought to trial before Lord Chief Justice Jervis, and so trifling did the action appear that the chief justice is said by Lord Cranworth (7 DeGex, M. & G. 445) to have said "with his usual keenness that it was a most ridiculous action." And I desire here for myself to say that I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the "discretion" of the chancellor, as I understand the force of that word in that connection. If by "discretion" is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration; no more and no less; and that is the sense in which I understand the word is used in Demarest v. Hardham. But if the word "discretion," in this connection, is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me

that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right. For instance, in Re Anderson, 17 N. J. Eq. 536, the question was whether a fund belonging to an infant should be transferred from one guardian to another, and it was held that its transfer rested in the discretion of the chancellor; and other cases are there cited. So with the question whether or not an issue should be framed by the chancellor to try a question of fact. That was declared by the Court of Errors and Appeals in Carlisle v. Cooper, 21 N. J. Eq. 576, to be a matter resting in the discretion of the chancellor. And so with the issuing of interlocutory injunctions where no property right is immediately affected.

I have taken the trouble to examine many of the cases which seem to hold more or less the contrary of what I understand to be the rule laid down by the Court of Errors and Appeals in Higgins v. Water Co., and find most of them distinguishable. The majority of them are rulings upon preliminary injunctions, where the right was not yet settled, or where the injury was not a continuing one, and the remedy at law ample, or, if on final hearing, there was something inequitable in the complainant's conduct or case which would amount to a defense in equity to an action at law. And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of parliament for that purpose, called "Lord Cairns' " and "Sir John Rolt's" acts. The giving of damages for continuing nuisances is quite within the omnipotent power of parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, as before remarked, that course is forbidden. I think the language of Lord Cranworth, quoted by the learned chief justice in Higgins v. Water Co., applies with increased force in this country.

While the "balance of injury" notion has found frequent place in many English cases, the later and best-considered of them put the rules governing courts of equity in such cases upon their true ground. Clowes v. Staffordshire Potteries Water Works Co., L. R. 8 Ch. App. 125, at pages 142, 143; Wilts, etc., Co. v. Water Works Co., L. R. 9 Ch. App. 451; Goodson v. Richardson, Id. 221,—are examples. This last was a case of an

injury to a bare right of property without any actual damage. Defendant had laid a water main in a public street, the fee of which was in complainant, and Lord Selborne held he was entitled to a mandatory injunction compelling it to remove it. In the course of his judgment he uses this language: "It is said that the objection of the plaintiff to the laying of these pipes in his land is an unneighborly thing, and that his right is one of little or no value, and one which parliament, if it were to deal with the question, might possibly disregard. What parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this court can take. But with respect to the suggested absence of value in the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable, and an object sought to be obtained. Besides which, I am not prepared to accede to the proposition that it is an unneighborly proceeding in a man, whose motive for desiring to prevent a particular act may be collateral to the interest in his land,—such, for instance, as his being a proprietor of waterworks which may be injured by the proposed use of it,—to say to his neighbor who wishes to compete with him in that business: 'You are perfectly at liberty to enter into competition with me as a seller of water to the public of Ramsgate in any lawful manner; but you are not at liberty to take my land without my consent for the purpose of competing with me, and I shall object to your doing so.' In that, I confess, I see nothing unneighborly whatsoever. * * * I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction." There was, in the case in hand, no contention that the neighborhood here in question was ever given

up by common consent to mechanical or manufacturing purposes. It seems to be one mainly of cheap residences and retail shops. The language of Chancellor Zabriskie in Ross v. Butler, 19 N. J. Eq., at pages 305, 306, is apt: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. Some parts of a town may, by lapse of time or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust, that an additional factory, which adds a little to the common evil, would not be considered at law a nuisance, or be restrained in equity. There is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court. I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also from allowing the water and spray from the exhaust of his engines to come onto the complainant's lands.

CHAPTER IV.

CANCELLATION—REFORMATION—RESCISSION.

Reformation.

CLEGHORN v. ZUMWALT.

83 Cal. 155, 23 Pac. 294. 1890.

FOX, J. Action to reform a deed. Judgment for defendant, and plaintiff appeals. The case comes up on the judgment roll. It appears from the findings that in October, 1885, Mary Cleghorn, then a minor, was the owner of an undivided one-tenth interest in the N. W. ¼ of section 11, township 18 N., range 6 W., M. D. M., which she had inherited from her father; that upon the death of her father a one-half interest in said land passed to her mother, who had also died in October, 1885; that in the course of settlement of the estate of the mother, and on the 8th day of May, 1886, the said one-half interest so held by the mother was, by an order of the probate court, duly given and made, set apart to, and declared to be the property of, said Mary, but she was then advised by her counsel that this order only gave her the use of the property during her minority, and that upon her becoming of age her brothers and sisters would take each a one-fifth interest therein, the same as they had done in her father's estate, leaving one-fifth to her, thus vesting in her at her majority two undivided tenths, or one undivided fifth, of the whole title to the tract. The court finds that this, the one-fifth interest, is what she and the defendant both supposed she owned when, in November, 1887, she being then of lawful age, defendant agreed with her to purchase her interest in the tract, and pay her $500 therefor, which price the court finds was the value of an undivided one-fifth of the tract. The court further finds that subsequently, and before the deed was executed, upon examination of an abstract of title, defendant was informed by his attorney, and at the time of the execution and delivery of the deed and payment of the money knew, that the

interest of plaintiff in the tract was three-fifths instead of one-fifth, but did not disclose the fact to plaintiff. The deed was in a form that conveyed all her interest, whatever it might be. The relief sought is to so reform the deed that it shall convey an undivided one-fifth, as both parties expected it would, and intended it should, at the time the bargain was made for it, and the price was fixed, and as one of them believed it did when it was made. The granting of this relief is resisted, not on the ground that it would be inequitable, or would not make the deed conform to the purchase as actually made, but on the technical ground that at the time of the actual execution and delivery of the deed there was not a mutual mistake of fact as to what it conveyed.

While, from its full finding of facts, the court below seems to have been fully impressed with the equity of plaintiff's case, it seems to have thought the point made by the defense to have been well taken; for it finds, as conclusion of law, that, "under the complaint as it now stands, said plaintiff is not entitled to the relief prayed for," and judgment is entered for defendant. In this we think the court erred. There is no doubt whatever that, at the time the minds of the parties met, and the bargain was actually made, the mistake was mutual. Both then understood and believed that what the one was selling and the other was buying was the undivided one-fifth, and the price was fixed on that basis. The execution and delivery of the deed afterwards was but the carrying into effect of the agreement already made. The mistake relates to the time of the agreement, not merely to the time of the carrying of the agreement into effect.

But, even if it be held that the cause of action must relate solely to the condition and understanding of the parties at the time of the execution and delivery of the deed, the case is one which comes within the provisions of § 3399, Civil Code, and entitles the plaintiff to the relief demanded. That section reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Here no question of the rights of

third persons is involved, and the court expressly finds that at the time of the execution and delivery of the deed the defendant knew that the plaintiff believed she was the owner of only an undivided one-fifth, and she was not informed by the defendant, or any one else, to the contrary, until after the execution of said deed. The allegations of the complaint are ample to cover either "mutual mistake" or "mistake of one party which the other at the time knew and suspected," or to entitle the plaintiff to the relief provided for in the section quoted. Judgment reversed, and case remanded, with instructions to the court below to enter judgment on the findings in favor of plaintiff, as prayed in her complaint.

We concur: PATERSON, J.; WORKS, J.

BARROW v. BARROW.

18 Beavan 529 (Eng.). 1854.

The Master of the Rolls. Two questions are raised in this case by the plaintiff, Mrs. Barrow. She seeks, in the first instance, to rectify the settlement made on her marriage with the defendant, so as to make it include therein a sum of £10,000, consols, to the interest of which she was entitled for her life, with a power to dispose of the principal by will. And if she fails in this respect, then she contends that she has an equity to a settlement out of the interest of this fund, and that in the circumstances of this case, the whole, or a very large proportion of such interest ought to be paid to her. The facts of the case, so far as they appear to me to be material for the questions I have to decide, are little if at all disputed, and are as follows:

On the marriage of this lady with her first husband, Mr. Combes, in the year 1839, by three deeds, the details of which need not be stated, two sums of £5,000 each were vested in trustees, in trust, during the joint lives of the plaintiff and her husband, to pay the interest thereof to the separate use of the plaintiff, without power of anticipation, and after his decease, in trust to permit the plaintiff to take the dividends for her life, and after her decease, to hold the capital in trust for such persons and to such uses as she should by will appoint.

Mr. Combes, the first husband, died on the 19th of April,

1847, and by his will left the whole of his property to the plaintiff, absolutely, and this, after payment of the debts and charges upon it, amounted in the whole to about £300 per annum. The defendant became acquainted with the plaintiff some time in the end of 1847 or the beginning of 1848. In June, 1850, he made a proposal of marriage to her, which was accepted, and the marriage itself was solemnized on the 30th of July, 1850. On the day before the solemnization of this marriage a settlement was executed, by which the property left by the will of Mr. Combes was settled on the plaintiff on the same trusts as the £10,000 was settled, on the occasion of her first marriage, but no mention was made of that sum, which remained standing upon the trusts of the first settlement, and the dividends of which, therefore, being payable to the wife simply, became subject to the control of her husband, who was entitled to take them jure mariti.

Mrs. Barrow alleges that it was intended and agreed that this sum of £10,000 should be included in the settlement then made, that it was omitted by mistake, and that, consequently, the settlement ought now to be rectified, by the introduction of that sum, and by making it subject to the trusts of that settlement.

Mr. and Mrs. Barrow went abroad immediately after the marriage; differences speedily arose between them; they returned in the course of September following, and on the 28th of that month Mrs. Barrow left her house, separated herself from her husband, and instituted proceedings against him to obtain a divorce on the ground of adultery and cruelty. On the 14th of July, 1852, a decree for a divorce a mensa, on the ground of adultery, was pronounced, but the Ecclesiastical Court thought that the case of cruelty was not proved. The plaintiff and defendant have continued to live apart since the 28th of September, on which Mrs. Barrow left her house in Torrington Square.

In the month of March, 1852, Mr. Barrow gave notice to the trustees of the £10,000 not to pay the dividends to the plaintiff, but to pay them to him. These facts raise both questions; the first depends on the fact which occurred previously, relative to the preparation and execution of the settlement of the 29th of July, 1850.

The first point (the rectification of the settlement) depends on the principle of equity, which may be thus stated: When the

parties to a marriage enter into an agreement as to the provisions to be introduced into the settlement to be then made, and the settlement, afterwards prepared and executed, does not correctly represent that agreement, but contains something agreed not to be inserted, or omits something which it was agreed should be inserted in it, this court will rectify the settlement by making it conformable to the agreement which was actually entered into. For this purpose parol evidence is admissible, and if it can be shown by proper evidence what the agreement really was, and that the settlement does not correctly represent that agreement, it is the duty of this court so to remodel the settlement as to carry the true agreement into effect.

Upon looking at the evidence for this purpose, in which there is in my opinion no material discrepancy, but taking the evidence of Mrs. Barrow alone as that most favorable to her case, I am of opinion that no agreement was entered into respecting the settlement of the £10,000. The result of the evidence appears to me to be that Mr. and Mrs. Barrow believed that, by the settlement made on her first marriage, the £10,000 was so settled that Mrs. Barrow had the exclusive power over it, and that they agreed that the rest of her property should be settled in like manner, which was accordingly done. The evidence further leads me to the conclusion that this belief, as to the effect of the prior settlement, prevailed up to the time when Mr. Barrow obtained a copy of that settlement, in the year 1852, subsequently to the marriage.

That Mrs. Barrow believed that all her property was settled to her separate use is, I think, clearly established; that she intended that it should be so settled is also, I think, proved; but all this is consistent with the belief, which I think prevailed in the minds of both herself and the defendant, that no fresh settlement was necessary or required for effecting that purpose so far as the £10,000 was concerned.

This belief also prevailing in the minds of both Mr. and Mrs. Barrow is, I think, the clue which reconciles, in all material respects, the evidence given by the other witnesses. The utmost that can be said in favor of Mrs. Barrow's case on this point, as the result of the evidence, appears to me to be this: That if the real effect of the first settlement as to the £10,000 had been present to the minds of both parties, they would have agreed that

it should have been included in the second settlement. If I am correct in this view of the evidence, I think that the conclusion is that this court cannot interfere to rectify the settlement. The jurisdiction of the court in matters of mistake is to be very cautiously exercised; the extent to which it can be carried in such a case as this is to correct an error in carrying into effect the real contract between the parties. I am not aware of any case, and none has been produced to me, where, in the absence of fraud, such as the suppression of a fact that ought to have been communicated, this court has interfered to make a settlement conformable with what would have been the contract between the parties if all the facts material to be known by them had been there present to their minds. Whether the court would resist the execution of a contract entered into under such circumstances, in a suit for the specific performance of it, I forbear to inquire; but where a settlement has been executed which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnized on the faith of that contract and of that settlement, it would be to substitute a new contract between the parties, and not to carry the real contract into effect, if I were to alter the settlement. On this first point, therefore, I entertain an opinion unfavorable to the case of the plaintiff.

Mistake of Law.

RENARD v. CLINK ET AL.

91 Mich. 1, 51 N. W. 692. 1893.

MONTGOMERY, J. The bill in this cause was filed to foreclose a mortgage executed by the defendant Alice A. Clink to one A. H. Van Dusan, and by him assigned to complainant. The other defendants are subsequent purchasers with notice, after the mortgage became due. A foreclosure at law was attempted, a sale made, and a deed executed to complainant; but, owing to the fact that the assignment of the mortgage to complainant was not of record at the time of said attempted foreclosure, that proceeding proved ineffectual. After the complainant had obtained her deed on the foreclosure at law, and before the filing of the present bill, the defendant Clink tendered to complainant the

amount due upon the mortgage, exclusive of the costs of such former foreclosure; and in this proceeding it is claimed that such tender operated to discharge the lien of the mortgage. The court below sustained this defense, and dismissed the bill.

It is made clear by the testimony that the complainant, at the time she refused the tender, supposed that she had acquired title by her former foreclosure, and that, notwithstanding this, she was ready to accept the amount of the mortgage, interest, and costs. It also appears that she offered to take the money tendered so far as it would go, but that defendant refused to permit this unless she would accept it in full payment and discharge of the mortgage. Under these circumstances, we think the court below erred in dismissing the bill. Under the repeated rulings of this court, a tender of the full amount due upon the mortgage will operate to discharge the lien of the mortgage if the tender be refused without adequate excuse. Moynahan v. Moore, 9 Mich. 9; Eslow v. Mitchell, 26 Mich. 500; Sager v. Tupper, 35 Mich. 134; Stewart v. Brown, 48 Mich. 383, 12 N. W. Rep. 499. But in the present case it appears beyond question that the complainant had no purpose of exacting from the defendant any sum beyond what she believed to be her legal due. While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. Martin v. Hamlin, 18 Mich. 354; Lapp v. Lapp, 43 Mich. 287, 5 N. W. Rep. 317. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interest, or estate, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. 2 Pom. Eq. § 849, p. 314; Reynell v. Sprye, 8 Hare, 222; Blakeman v. Blakeman, 39 Conn. 320; Whelen's Appeal, 70 Pa. St. 410; Hearst v. Pujol, 44 Cal. 230;

Morgan v. Dod, 3 Colo. 551; Cooper v. Phibbs, L. R. 2 H. L. 149; Lansdowne v. Lansdowne, 2 Jac. & W. 205. In Myer v. Hart, 40 Mich. 517, the mortgagor filed his bill to set aside a mortgage sale, and asked that the premises be relieved from the mortgage lien. The court found that the mortgagee was mistaken as to his legal rights, but was acting in good faith, and refused to enforce the statutory penalty, and decreed that the mortgagor pay the mortgage debt as a condition to relief. In Canfield v. Conkling, 41 Mich. 371, 2 N. W. Rep. 191, a bill was filed to set aside a mortgage, and to recover the penalty for refusal to discharge it on tender of the amount due. The court found that the tender was sufficient, and say: "He [defendant] was bound to accept the tender, and complainant had made out a sufficient case for relief. But the question was one on which he might be mistaken without any serious fault, and we do not think it one where the mortgage ought to be held canceled without payment; nor is it a case calling for statutory penalty for a willful and knowing wrongful refusal to discharge the mortgage." The decree below should be reversed, and a decree entered in this court providing for a sale of the mortgaged premises to satisfy the amount due and unpaid upon the mortgage. The defendant will recover the costs of the court below, and the complainant will be entitled to the costs incurred in this court. The other justices concurred.

CHAPTER V.

BILLS OF PEACE—CLOUD ON TITLE—PARTITION.

Bills of Peace.

SMITH v. BANK OF NEW ENGLAND.

69 N. H. 254, 45 Atl. 1082. 1897.

Bill in equity, in behalf of the plaintiff and all others of like interest, alleging that the plaintiff is the owner of certificates of deposit issued by the Union Trust Company, which are indorsed by the defendants in the manner stated below; that on March 29, 1892, it was agreed between the trust company, a corporation organized under the laws of Iowa, and doing business in that state, and the defendants, that the trust company should issue certificates of deposit to an amount to be thereafter fixed, and should assign and transfer to the defendants, to be held by them in trust to secure the payment of the certificates, real estate and other securities approved by the defendants to an amount exceeding, at their face value, by 10 per cent, the amount of the certificates; that the defendants should thereupon certify upon each of the certificates that its payment was so secured; that the trust company might at any time withdraw any of the securities upon substituting others of equal or greater value; that, under and in pursuance of the agreement, the trust company issued certificates of deposit to the amount of $69,000, and the defendants certified thereon that, to secure the payment thereof, they held securities of the full value of 10 per cent in excess of the amount of the certificates, though they in fact held only 505 shares of bank stock, of the face value of $50,500; that subsequently the trust company withdrew the bank stock, and substituted other securities, which were accepted and approved by the defendants, of the face value of $91,000, but all of which, except 180 shares of bank stock, of the face value of $18,000, were wholly worthless, as the defendants then knew, or by due care would have learned; that the defendants neglected to cause the 180 shares

of bank stock to be properly transferred to them, in consequence of which, upon a liquidation of the affairs of the bank, the full value of the stock was paid to the trust company; that whether the trust company paid this money, or any part of it, to the defendants, the plaintiff does not know, and prays to be informed; that 78 other persons (whose names and residences are stated) hold certificates of deposit similar in all respects to those owned by the plaintiff, but that the amount held by each of them and the extent of their respective interests are unknown to the plaintiff, and can only be determined upon an accounting; and that the trust company is in the hands of a receiver, and has no substantial assets. The prayer of the bill is (1) for an order requiring all persons in like interest to join in the action or be barred from sharing in the decree; (2) for discovery and an accounting; and (3) for a determination of the damage caused by the defendants' negligence in the management of the trust estate, and a decree that the defendants shall pay the same. The defendants demurred because (1) the bill is multifarious; (2) the plaintiff has a plain and adequate remedy at law; and (3) the bill is without equity.

CARPENTER, C. J. The bill is not multifarious, nor would it be if all the holders of certificates were in fact made parties to it either as plaintiffs or defendants. They are all equally and directly interested in the disposition of any trust funds now held by the defendants, and in any damages that may be awarded against them for a breach of the trust. All the matters in controversy relate exclusively to the alleged conduct and misconduct of the defendants as trustees. It not only appears that by the joinder of all others of like interest with the plaintiff the defendants will not be embarrassed or subjected to any expense or inconvenience in making their defense, nor that any injustice will be done them, but that the matters in dispute can be more conveniently, economically, and expeditiously adjusted in one suit. Chase v. Searles, 45 N. H. 511; Eastman v. Bank, 58 N. H. 421, 422; Page v. Whidden, 59 N. H. 507, 509. The prevention of useless litigation and a multiplicity of needless suits is a recognized ground of equity jurisdiction. It is upon this principle that bills of peace are sustained. 1 Story, Eq. Jur. § 853. The bill may be brought as well by the numerous claim-

ants of the right in question as by him against whom the claim is made. Cowper v. Clerk, 3 P. Wms. 155, 157; Conyers v. Abergavenny, 1 Atk. 285; Powell v. Powis, 1 Younge & J. 159; Phillips v. Hudson, 2 Ch. App. 243.

The plaintiff's bill is in the nature of a bill of peace. One of its objects is to obtain an adjudication of the rights of the parties in one suit instead of 79 suits. For the present purpose it may be assumed that the only cause of action disclosed by the bill is for damages caused by the defendants' negligence, for which the plaintiff and the other holders of certificates have each plain and adequate remedy at law. If the parties in interest severally brought actions at law, the question of the defendants' negligence would be exactly the same in all the actions, and would necessarily be determined upon the same evidence. Substantially, the damages of the several plaintiffs would be assessed upon the same principle. In each case the same witnesses would have to be called, at the same cost. Each trial would consume the same length of time and subject each party to the same expense. For the determination of one issue the public must provide 79 sessions of the court and 79 juries. In short, a single issue, upon which the rights of all parties interested in the controversy depend, must be tried 79 times, and the parties and the public be subjected to the worse than useless expense of 79 trials.

The defendants' position that "the equity jurisdiction of the court to prevent a multiplicity of suits cannot properly be invoked, except by the person who may be subjected to them," is supported by no authority and has no foundation in principle. A speedy and inexpensive adjudication of their common right is quite as important to the numerous plaintiffs as to the single defendant, and it may be much more so. Cases may often happen where a rejection of their application for equitable intervention to prevent a multiplicity of suits would operate practically as a denial of justice. Suppose, e. g., that each of one hundred persons held an interest coupon for, say, six dollars on bonds issued by a town or other corporation, and that the only controverted question was the validity of the bonds; each coupon holder would have a clear, and, in a legal sense, an adequate, remedy at law. But if he recovered in an action at law he would realize nothing, as the necessary expenses of the suit would exceed the amount recovered. If, on the other hand, the question

were determined in one suit, each might realize substantially the amount of his demand. To hold that equity will intervene in behalf of the corporation, but not in behalf of the coupon holders, to compel the issue to be tried in one suit, would bring deserved reproach upon the administration of justice. "The weight of authority," says Mr. Pomeroy, "is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, * * * where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." 1 Pom. Eq. Jur. § 269. Such would be the doctrine here, if there were no authority on the subject. Any reasonably necessary process for conveniently and economically ascertaining rights and furnishing a remedy for their violation may be used. Webster v. Hall, 60 N. H. 7; Metcalf v. Gilmore, 59 N. H. 417, 434; Walker v. Walker, 63 N. H. 321; Brooks v. Howison, Id. 382, 388. For the enforcement of the rights of parties our common law provides "the best inventible procedure." Gage v. Gage, 66 N. H. 282, 294, 29 Atl. 543; Owen v. Weston, 63 N. H. 599, 600, 602, 4 Atl. 801.

An order may be made at the trial term (if the defendants desire or deem it necessary for their protection against other suits) that all the certificate holders who, upon proper notice, fail to appear as plaintiffs on or before the time set for the trial, or other specified time, shall be forever barred from participating in any of the trust funds, or in any damages that may be awarded by reason of the defendants' negligence, and from hereafter bringing any action. The bill may be maintained to avoid a multiplicity of suits. This result makes it unnecessary to consider whether it might be maintained upon other grounds. Demurrer overruled.

PARSONS, J., did not sit. The others concurred.

Cloud on Title.

PIXLEY v. HUGGINS.

15 California 128. 1860.

FIELD, C. J., delivered the opinion of the court—Baldwin, J., and Cope, J., concurring.

This is a suit, on the equity side of the court, to enjoin the sale of certain real property, alleged to belong to the plaintiff, situated in the city of San Francisco, under an execution issued upon a judgment recovered by the defendants, Huggins and Hall, against B. F. Moulton and others. The facts of the case are briefly as follows: In August, 1852, the property in question was conveyed by Thomas O. Larkin to the wife of Moulton, for four thousand dollars, and this sum is recited as the consideration in the deed to her. A few days subsequently, Moulton and wife conveyed, by their joint deed, the property to the plaintiff, for the consideration, recited therein, of nine thousand and five hundred dollars. This deed was acknowledged by both husband and wife and recorded.

In October, 1855, the defendants, Huggins and Hall, recovered a judgment in the District Court of the Fifth Judicial District, against Moulton and others, for upwards of seven thousand dollars, and on the fifteenth of December of the same year, a transcript of the docket of the judgment was filed in the office of the recorder of San Francisco county, so as to become a lien upon property owned by Moulton at the time in that county. Upon this judgment execution was issued, and placed in the hands of the sheriff of San Francisco county, who proceeded thereunder, and levied upon the property which was conveyed by Moulton and wife to the plaintiff, and advertised for sale all the right, title, and interest which Moulton possessed therein on the said fifteenth day of December, 1855. It is to enjoin this sale that the present suit is brought. * * *

As the property belonged to the community, it was subject to the disposition of the husband. As the property vested by the deed of August, 1852, no interest would have passed to the purchaser under the sale advertised upon the execution issued upon the judgment of Huggins and Hall. But it does not follow, as the counsel of the defendants insist, that the plaintiff was not

entitled to the equitable interposition of the court to prevent the sale. The jurisdiction of the court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be cancelled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncancelled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient, to call into exercise the jurisdiction of the court, that the deed casts a cloud over the title of the plaintiff. As in such case the court will remove the cloud, by directing a cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such cloud must result. Pettit v. Shepherd, 5 Paige, 501. And every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such cloud upon the title. Such deed is calculated to create uneasiness in the owner, and to awaken suspicions in others of the existence of concealed defects in the title, which may, at some day, be developed, and must thus tend to depreciate the value of the property in the market, and to embarrass the owner in its sale or use as security.

The deed of the sheriff, upon the sale on the execution of the defendants, would have, of course, the same effect as if the deed were executed directly by Moulton himself; and if placed upon the record it would naturally create doubts as to the validity, as against the judgment creditors, of the previous transfer to the plaintiff. The very fact that the conveyance from Larkin was taken in the individual name of the wife would add strength to these doubts, and lead to the inference that the transfer was intended only as a cover. Against the casting of a shade in this way upon his title, the plaintiff was entitled to the preventive remedy, by injunction. * * *

The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight,

without proof in rebuttal, no occasion could arise for the equitable interposition of the court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail. "That can never be considered a legal cloud," says Chancellor Walworth, in Van Doren v. The Mayor, etc., of New York, 6 Paige, 388, "which cannot for a moment obstruct the unaided rays of legal science, when they are brought to bear upon the supposed obscurity. But where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, as where the defendant has procured, and put upon record a deed obtained from the complainant by fraud, or upon an usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void—a court of equity may interfere, and set it aside as a cloud upon the real title to the land." Wiggin v. Mayor, etc., of New York, 9 Paige, 23; Livingstone v. Hollenbeck, 4 Barb. Sup. Ct. 16. So, too, a conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon so much waste paper.

Judgment affirmed.

CHAPTER VI.

SUITS FOR PECUNIARY RELIEF.

Creditors' Suits.

MERCHANTS' NATIONAL BANK v. PAINE.

13 Rhode Island 592. 1882.

DURFEE, C. J. The bill alleges that Walter Paine, 3d, one of the defendants, is indebted to the complainant by promissory note in the sum of five thousand dollars and interest, and seeks to obtain payment thereof out of certain equitable interests, which came to him under the will of his father, and which he is alleged to have conveyed to one of his co-defendants for the purpose of defeating the claims of the complainant. The bill also alleges that between the making and maturity of the note said Paine absconded, so that he cannot be found either in this state or in Massachusetts, the state of his domicile, and that he has left no property in this state which the complainant can attach and thereby secure service in any action to recover judgment against him, and that the complainant has exhausted all its remedies at law. The defendant demurs to the bill on the ground that it does not appear by the bill that the claim of the complainant has ever been reduced to judgment at law, or that execution has ever been sued out thereon.

The question is whether a suit in equity can be maintained to enforce payment of a purely legal claim out of equitable assets before the claim has gone to judgment and execution at law. The counsel for the complainant admit that as a rule it cannot; but they contend that the only reason why it cannot is because a court of equity will not interpose until the creditor has exhausted his remedies at law, and because the best evidence that he has exhausted them is a judgment, when recoverable, with execution sued out thereon and returned unsatisfied for want of property. And they also contend that, when this evidence cannot be procured because the debtor is absent or has absconded, leaving no

attachable estate, the court will proceed without it upon other satisfactory proof. They cite a Kentucky case in which this view is fully sustained by judicial decision. Scott v. McMillen, 1 Litt. 302. They also cite cases which contain favorable dicta, some of which appear to have been expressed after careful consideration. Russell v. Clark's Executors, 7 Cranch, 69, 89; Miller v. Davidson, 8 Ill. 518, 522; Greenway v. Thomas, 14 Ill. 271; Anderson v. Bradford, 5 J. J. Marsh. 69; Meux v. Anthony, 11 Ark. 411, 418. They cite other cases which hold that a judgment creditor may resort to equity before execution when, the debtor being insolvent, the execution would manifestly be of no avail. Turner v. Adams, 46 Mo. 95, 99; McDermott v. Strong, 4 Johns. Ch. 687, 689. And they cite a New York case in which the court expressed itself strongly in support of the jurisdiction, in favor of a creditor who was prosecuting a judgment recovered in another state. McCartney v. Bostwick, 32 N. Y. 53.

Besides these cases, cited by counsel, we have found other cases which emphatically support the same view—cases, indeed, from which it appears that the jurisdiction contended for has been unequivocally affirmed in Kentucky, Virginia, Indiana, South Carolina, and Missouri. Scott v. McMillen, supra; Peay v. Morrison's Executors, 10 Gratt. 149; Kipper v. Glancey, 2 Blackf. 356; O'Brien v. Coulter, 2 Blackf. 421; Farrar v. Haselden, 9 Rich. Eq. 331; Pendleton v. Perkins, 49 Mo. 565. In the last cited case the court, after reviewing the other cases, say, p. 568: "It seems thus to be satisfactorily settled upon authority that when the debtor has absconded, so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, a creditor's bill will lie, in the first instance, and from the necessity of the case. It is analogous to a proceeding to subject the equities of a deceased debtor, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in neither of which cases is a personal judgment required."

If it were true that the only reason for the rule is the exhaustion of legal remedies, we should not hesitate at all to assert the jurisdiction, for very clearly where no legal remedy exists, none can be exhausted, and the reason for the rule would cease, and with the reason the rule itself. "Cessante ratione legis, cessat ipsa lex." There is, however, another reason for the rule,

namely, that a court of law is the proper tribunal not only to afford a remedy for legal claims, but also to adjudicate them. It seems to be well settled, however, that a creditor may proceed in equity without first getting a judgment at law, if his debtor be dead. And if he can so proceed, if his debtor be dead, there can be no insuperable reason against his so proceeding while his debtor is alive. Thompson v. Brown et al., 4 Johns. Ch. 619; O'Brien v. Coulter, 2 Blackf. 421; Steere v. Hoagland, 39 Ill. 264; The Unknown Heirs of Whitney v. Kimball, 4 Ind. 546; Thorp v. Felts, Administrator, 6 B. Mon. 6; Everingham v. Vanderbilt, 19 N. Y. Supreme Court, 75; Offutt v. King, 1 McArthur, 312. If the claim be one that is peculiarly fit for legal, or peculiarly unfit for equitable cognizance, issues can be framed for jury trial. The jurisdiction ought to be, if it can be, upheld, since without it a debtor may have valuable property and yet escape the payment of his debts. Our conclusion is, so far as this point is concerned, that the suit can be maintained.

CHAPTER VII.

PROVISIONAL REMEDIES—THE AUXILIARY JURISDICTION.

Interpleader.

PLATTE VALLEY STATE BANK v. NATIONAL LIVE STOCK BANK.

155 Ill. 250, 40 N. E. 621. 1895.

WILKIN, C. J. Appellee filed its bill of interpleader in the Circuit Court of Cook county against the appellant, the Union Stock Yards National Bank, and Halsey. According to the allegations of the bill, as amended, one F. A. Halsey,—who was also made a party defendant to the bill, and was defaulted,—by his agent, deposited with appellee the sum of $5,963.18, to be credited to the appellant, Platte Valley Bank, and to be remitted or paid to said Platte Valley Bank upon presentation of a draft to be drawn by it. When the money was so deposited, the agents of Halsey requested appellee to immediately notify the Platte Valley Bank of the deposit and credit having been made; and notification thereof was accordingly, and on the same day, given by both telegram and letter. It was further alleged, upon information and belief, that the Platte Valley Bank, acting upon said telegram and letter, and prior to any further advice from the appellee concerning the money so credited, paid out, to an extent unknown to appellee, certain sums of money upon orders therefore drawn by said Halsey, and that said Platte Valley Bank does now, and has ever since the day of such deposit, claimed of appellee the entire sum so deposited and credited, and that the entire sum so deposited and credited still remains in the hands of the appellee. It is further alleged that four days after said deposit was made, and before the receipt by appellant of any draft or other request by the Platte Valley Bank or by said Halsey, the Union Stock Yards National Bank of South Omaha made known to appellee that it claimed

said fund of $5,963.18, asserting that the same was the proceeds of sale of certain cattle owned by said Halsey, and mortgaged to said Union Stock Yards Bank, and wrongfully converted by Halsey without its knowledge or consent, and that said Platte Valley Bank had notice of such mortgage and wrongful conversion, and of the disposition of the proceeds as aforesaid; that said Union Stock Yards Bank claims said money, and has notified appellee not to pay the same to the Platte Valley Bank, and has begun a suit at law in attachment to obtain said fund from appellee, as garnishee, and threatens other suits at law and in equity against appellant; that both the Platte Valley Bank and the Union Stock Yards Bank claim from appellee the said specific fund of $5,963.18; that both of said banks' claims against appellee arise out of the depositing by Halsey of said fund with appellee; that the appellee is in danger of being harassed by other suits of said claimants; that appellee is, and always has been, willing to pay said fund to whomsoever is lawfully entitled thereto, and offers to bring the same into court; that appellee fears it cannot be protected by the judgment that may be recovered against it in the suit at law that has been begun, or in other suits that may be begun against it by either of the rival claimants to said fund, and therefore prays that the said several claimants to said fund may be required to interplead, and settle their demands between themselves; that appellee has no interest in the subject-matter, and is not colluding with either of said claimants touching the matter in controversy, but exhibits its bill of interpleader merely that it may be protected in the payment of said fund, and avoid being harassed by the claimants thereto, and agrees to pay the same to whichever claimant may be adjudged to be entitled thereto, and prays for an injunction against the prosecution of said attachment proceedings, and from other suits being begun against appellee for the recovery of said money.

On the merits of the case, but one ground of reversal is urged by counsel for the appellant, and that is that the appellate court erred in holding the bill of interpleader sufficient, and reversing the order of the circuit court sustaining the demurrer thereto. After stating the material allegations of the bill substantially as above set forth, the appellate court, in its opinion, by Shepard, P. J., says: "It is laid down in 3 Pom. Eq. Jur. § 1322, that the

equitable remedy of interpleader depends upon, and requires the existence of, the four following elements: 'First. The same thing, debt, or duty, must be claimed by both or all the parties against whom the relief is demanded. Second. All their adverse title or claims must be dependent on, or be derived from, a common source. Third. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter. Fourth. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.' Counsel for the appellee, Platte Valley Bank, contend, seriatim, that the appellant's case, as made by its bill, fails to meet the first, second, and fourth of the essential conditions so laid down by Mr. Pomeroy.

What is claimed by the appellee, the Platte Valley Bank, and the Union Stock Yards Bank, is the chose in action, the debt, the credit that was given and arose from the depositing of the money with the appellant. The identical money that was deposited is not, and, for the reason that the title to it passed to the appellant, and its identity became lost, when the deposit was made, could not be, the subject of conflicting claims, but the credit, or, in other words, the debt, is what is claimed; and it is the same debt, and not a different one, that is claimed by both claimants. It would be difficult to state a subject of dispute, that did not possess a bodily existence, about which there could be less difficulty of identification. The only contention against the existence of the second condition stated to be essential to the right to maintain interpleader is based upon the showing by the bill of payments of money by the Platte Valley Bank, acting upon the telegram and letter of appellant, on orders drawn on it by Halsey. The liability of appellant to the Platte Valley Bank does not depend upon whether that bank paid Halsey's order or not, but exists, if at all, because of receiving and crediting the deposit for the account of that bank. Neither the appellant nor the Platte Valley Bank were under any obligations to each other as to what disposition the latter should make of the money credited to it. It may or may not happen that the Platte Valley Bank has suffered loss through reliance upon the fund which was deposited with the appellant to its credit. Such an occurrence in no manner affects the question

of whether the adverse claims to that fund are dependent on, or derived from, a common source. If it may hereafter be held that the Platte Valley Bank has a claim superior to the Union Stock Yards Bank on the deposited fund, to the partial extent of payments made in reliance upon the credit given, or to the whole extent of the entire deposit, the allowance of such a claim would arise out of, and rest upon, the fact of the credit that was given, and in either case would have for its foundation the same source that its claim for the entire fund now has, viz. the deposit by Halsey, and the credit thereof that was given by the appellant to the Platte Valley Bank. And the claim of the Union Stock Yards Bank, if it shall prevail, will rest upon the same source, to wit, the deposit by Halsey. The common source of both claims is Halsey. The appellant further contends that the bill fails to show a case that is within the third and fourth of the conditions laid down by Mr. Pomeroy, as essential to a bill of interpleader, for the reason that it appears that appellant has incurred an independent liability to the Platte Valley Bank, and therefore has an interest in the fund inconsistent with the indifference of a mere stakeholder. We do not so consider it. The only theory upon which it can be argued that an independent liability arose from the appellant to the Platte Valley Bank grows out of the fact of the deposit of the fund with appellant by Halsey to the credit of the Platte Valley Bank, and the consequent relation of debtor and creditor thereby created. The liability of appellant, whatever and to whomsoever it was, arose from the act of deposit and acceptance of the fund. It did not spring from the telegram and letter of notification. Such papers did not constitute the contract, but were mere evidence of it. Neither did they increase appellant's liability, nor affect it in any way. The liability of the appellant would have been just the same to the Platte Valley Bank without any such notification having been given as with it. The independent liability that will deprive a depositary of the right to require rival claimants to the deposit to interplead may arise either by express acknowledgment of the title of one of the claimants, or out of such contractual relations as will bind him, as upon an independent undertaking, without reference to his possible liability to the other claimant. 3 Pom. Eq. Jur. § 1326. Under such circumstances, he does not stand indifferent

between the claimants, since one of them has a valid, legal demand against him, at all events. What is there in the mere fact of notification of deposit and credit, such as the bill alleges, that constitutes an undertaking by the appellant to the Platte Valley Bank, independent of the transaction with the agents of Halsey?

The notification was given before the appellant was informed of the claim of the Union Stock Yards Bank to the deposit, and it should not be construed into a contract to pay the money notwithstanding an adverse claim to it, of which no notice had been given. The notification was merely of a fact, viz. the deposit and the credit; and there was in it no element of new contract, or independent undertaking, with reference to the subject, i. e. the deposit. The question here is merely whether the statements in the bill constitute such a case as entitles the appellant to the protection afforded by a bill of interpleader, and we have endeavored to show that all the conditions required to maintain such a bill exist in what is alleged in the bill, and that the demurrer ought to have been overruled, and the rival claimants required to interplead. As was stated by Lord Chancellor Cottenham in Crawshay v. Thornton, 2 Mylne & C. 1 (14 Eng. Ch. 1): 'The case tendered by every such bill of interpleader ought to be that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants, beyond those which arise from the title to the property in contest.' That a bill of interpleader will be sustained notwithstanding the suggestion that appellant might protect himself by defending in the suit already begun, and in all others that may be brought against him, has been decided by this court heretofore. Curtis v. Williams, 35 Ill. App. 518; Livingston v. Bank (No. 4,684; filed Nov. 27, 1893), 50 Ill. App. 562. As said in the latter case: 'The true reason for the remedy is the risk of vexation and expense from two or more suits by different parties for the recovery of the same thing.' The appellant, having only the legal title and possession of the fund or money to which conflicting claims derived from a common source are set up, and being under no independent liability concerning the fund, ought to be permitted to interplead the parties, bring the money into court, and go free, leaving the rival

claimants to settle their contest in a proceeding wherein a final judgment will be a termination of the controversy between all parties."

After considering the argument of counsel for appellant, and the authorities cited as holding that a bill of interpleader will not lie upon the state of case made by this bill, we are satisfied that the law applicable to the facts alleged in complainant's bill, and admitted by the demurrer, is correctly announced in the foregoing opinion, and a proper conclusion there reached. The argument in support of the proposition that the complainant had, prior to filing its bill, incurred an independent liability to appellant, and cannot, therefore, ask to be relieved from accounting to it by interpleader, does not give weight to the fact that the acts by which the independent liability to appellant is claimed to be established were done in ignorance of the fact that the Omaha bank claimed the fund under its chattel mortgage, and that said Platte Valley Bank had notice of such mortgage and wrongful conversion, and of the disposition of the proceeds, as aforesaid. The judgment of the appellate court will be affirmed. Affirmed.

Receivers.

FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL COMPANY.

50 Fed. Rep. 481. 1892.

In Equity. Bill by the Farmers' Loan & Trust Company against the Grape Creek Coal Company to foreclose a mortgage. A receiver was appointed, and he now asks leave to issue receiver's certificates.

GRESHAM, J. The defendant, a private corporation, whose chief business is mining and selling coal, conveyed to the complainant, in trust, lands and two coal mines in Vermilion county, Ill., to secure an issue of bonds amounting to $500,000. An installment of interest was allowed to remain due for more than six months, and this bill was filed to foreclose the trust deed. Joseph G. English, who was appointed receiver, asks for an order authorizing him to issue receiver's certificates not exceeding in

all $24,000, which shall be a first lien upon the trust property, to enable him to pay taxes now due, amounting to $3,428.64, take up outstanding certificates amounting to $6,400, which were issued under an order of the Vermilion circuit court, in a suit to foreclose the same trust deed, and to continue the operation of the mines. The receiver represents that, with additional working capital, he could operate the mines profitably, and better protect them. The holders of 75 per cent. of the bonds and the corporation join in the receiver's request. The holders of the remaining 25 per cent. resist the application. The corporation is insolvent. It is not claimed that the receiver is without means to pay taxes, and it is chiefly to enable him to continue the operation of the mines for anticipated profits that he desires authority to issue certificates.

When it becomes necessary for a court of chancery to take possession of property which is the subject of litigation, by placing it in the hands of a receiver, all expenses incident to its safe-keeping and preservation are properly chargeable against it; and, if there be no income, such expenses will be paid out of the proceeds of the corpus before distribution to lien or other creditors. It does not follow, however, that because property of a private corporation or a natural person may be thus protected and preserved before sale, that, in order to raise money to operate it for profit, a court may place a charge upon it in advance of existing liens. Pending a suit to foreclose a mortgage executed by a railroad corporation, the road may be operated by a receiver, and debts contracted for labor, supplies, and other necessary purposes before as well as after the appointment of a receiver, may be made a first lien upon income, and, if that is not adequate, upon the corpus of the property. In the exercise of this exceptional and extraordinary jurisdiction, which is of comparatively recent origin, courts have entered orders making receiver's certificates first liens on the mortgaged property. This has been done, however, on grounds not applicable to mortgages executed by private corporations. A railroad corporation is a quasi-public institution, charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts pending proceedings for the sale of the road will operate it by a receiver, and make the expense incident thereto a first lien. This is done on ac-

count of the peculiar character of the property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. Fosdick v. Schall, 99 U. S. 235; Barton v. Barbour, 104 U. S. 126; Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. Rep. 140; Union Trust Co. v. Railroad Co., 117 U. S. 434, 6 Sup. Ct. Rep. 809; Wood v. Trust Co., 128 U. S. 421, 9 Sup. Ct. Rep. 131; Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. Rep. 950; Morgan's, Etc., Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. Rep. 61.

In Wood v. Trust Co. the court said:

"The doctrine of Fosdick v. Schall has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

In Kneeland v. Trust Co., supra, in discussing the jurisdiction of the chancellor to displace the lien of a railroad mortgage, the court said:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all

unsecured indebtedness in preference to the mortgaged liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reasons that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

And further on in the same opinion the court said:

"If, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself."

In the language above quoted, there is a plain implication that the limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations. The court is not asked to subvert the lien of the mortgage on the ground that the trustee or bondholders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bondholders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Exten-

sive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages (sometimes with unwarranted freedom) on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied.

PART II

EQUITABLE PROPERTY RIGHTS AND INTERESTS

CHAPTER VIII.

TRUSTS.

Charitable Trusts.

HUNT, ATTY. GEN., AND OTHERS v. FOWLER AND OTHERS.

121 Ill. 269, 12 N. E. 331, 17 N. E. 491. 1887.

SHELDON, J. This was a bill in chancery filed by the heirs at law of Esther S. Chapman, deceased, against the attorney general of the state and the executors of the will of the decedent, to have a certain portion of the estate left by her declared to be intestate, and to belong to the complainants, as heirs at law of the decedent. The will, executed March 15, 1883, after making sundry bequests to various persons other than the complainants, concluded with this residuary clause: "All the residue of my estate I devise and bequeath unto the legatees hereinbefore named, in equal proportions, excepting said Oakwood seminary and said Sylvester M. Chapman." Subsequently, on April 5, 1885, the testatrix executed a codicil which contained this residuary clause: "All the rest and residue of my estate, including that which may lapse for any cause, I direct to be invested or loaned upon the best terms possible, so as to produce the largest income, and said income to be distributed among the worthy poor of the city of La Salle, in such manner as a court of chancery may direct." Executors of the will were appointed. The decedent left both real and personal estate.

The bill alleges that the city of La Salle is situated in the town of La Salle and includes but a small portion of the territory of the town; and that there is not now, nor has there ever been, in said city, any organization or association, voluntary or

otherwise, for the distribution of charity to the poor of the city; and that the municipal authorities have no duties imposed upon them to provide for the poor; and claims that the residuary clause of the codicil is incapable of execution by reason of the uncertainty of the beneficiaries intended by the testator, and void; and that, in consequence, all the rest and residue of the estate, both real and personal, after the payment of the general and specific legacies, was intestate estate. A demurrer to the bill was interposed by the attorney general and the executors, which was overruled by the court, whereupon the executors answered, denying the invalidity of the residuary clause of the codicil, or that it was incapable of execution, and setting up that, even if such were the case, the rest and residue of the estate must be distributed in accordance with the residuary clause of the will. Thereupon the bill was amended by making the residuary legatees specified in the will additional parties defendant. Subsequently a hearing was had upon pleadings and proofs, and a decree was entered finding that the residuary clause of the codicil was ineffectual to dispose of the property, but that it nevertheless revoked the residuary clause of the will, and declaring that the real estate of which the testatrix died seized belonged to the complainants as her heirs at law, and directing that the rest and residue of the personal estate should be distributed to the complainants as intestate estate. From this decree the attorney general, the executors, and a portion of the legatees specified in the residuary clause of the will have prosecuted this appeal.

There is in American courts much diversity of decision upon the subject of charitable trusts. In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified cestui que trust clearly identified, or made capable of identification, by the terms of the instrument erecting the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain,—a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a quasi-public character. 2 Pom. Eq. Jur. § 1018.

In some of the states the equitable system of distinctively charitable trusts is not recognized, and the courts apply only the rules applicable to express private trusts. In other states

the "statute of charitable uses" of 43 Eliz. c. 4, has been adopted or repealed, and thereby decisions have been influenced. And in other cases local legislation, or supposed local policy, to more or less extent, enters into adjudications. In another, and, as believed, the larger, portion of the states, the system of charitable trusts as administered in the English court of chancery, in the exercise of its ordinary judicial power, prevails, with variation in regard to the element of certainty in the trustee and the object of the charity. A classification of the decisions in the several states will be found in 2 Perry, Trusts, § 748, in note, and 2 Pom. Eq. Jur. § 1029, and note. The prerogative power of the crown, exercised through the lord chancellor as the representative of the king, as where there is a gift to charity generally, without appointment of a trustee, and the bounty is devoted to some particular charity, or where there is a gift to a particular charitable purpose which cannot be effectuated, and it is applied to some other charitable use, cy-près the original purpose, is regarded not as a judicial, but a ministerial, prerogative function. This prerogative power courts in this country do not assume to exercise.

Were this subject of charitable trusts a new question with us, there would be opened up a wide and interesting field of discussion in order for the establishment of the proper rule in this regard. But we are saved labor in this respect, from the ground having heretofore been gone over by this court, and the rule applicable to charitable trusts having been established to be that which is administered in the court of chancery in England, in the exercise of its ordinary jurisdiction as a court of equity. This was done in the case of Heuser v. Harris, 42 Ill. 425, and where it was recognized that the statute of 43 Eliz. c. 4, had been adopted in this state.

The entire contention in this case arises upon the construction, validity, and effect of this residuary clause of the codicil. It is insisted this clause is void for uncertainty as to the beneficiaries.

This is not a bequest to charity generally, or to the poor generally, but to the worthy poor of the city of La Salle. The class here is definite,—the worthy poor of the city of La Salle,—but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty

as to individuals, in the case of public charities, and it is this feature of uncertainty which distinguishes public charities from private charities; charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty is to reject this whole distinctive doctrine of charitable trusts. 2 Redf. Wills, p. 544 (66).

In the case of a charitable bequest it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects. Domestic & F. M. Soc.'s Appeal, 30 Pa. St. 425; Perry, Trusts, § 732. It is denied that there is any such discretionary power here given, and White v. Fisk, 22 Conn. 31, is cited in support of such denial. The bequest in that case was: "Any surplus income that may remain, to the extent of $1,000 per annum, I direct to be expended by my said trustees for the support of indigent, pious young men preparing for the ministry in New Haven." The decision was that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by selection. This case, though meeting with seeming approval in Grimes' Ex'rs v. Harmon, 35 Ind. 198, has been disapproved by other high authorities. See Perry, Trusts, §§ 713, 720, 748, note 1; 2 Redf. Wills (2d ed.), p. 541, note; Hesketh v. Murphy, 36 N. J. Eq. 304. The latter case especially speaks of White v. Fisk as a case not likely to be followed.

In Hesketh v. Murphy the testator's will empowered and directed the trustees to employ the annual income of the fund "for the relief of the most deserving poor of the city of Paterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral, or undeserving, to receive any benefit from the said fund." It was objected that the gift could not be applied to its objects and was void, because the will did not confer upon any one the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustees by the will to distribute the fund carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely agree with the criticism there made by Chief Justice Beasley upon

the case of White v. Fisk, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustees; that when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection; and this, upon the ordinary doctrine that, when one act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power. See Pickering v. Shotwell, 10 Pa. St. 23, that the power in the trustee to act at discretion need not be expressly given, if it can be implied from the nature of the trust. In the later case of Erskine v. Whitehead, 84 Ind. 357, the decision in Grimes v. Harmon does not seem to be approved in its full extent.

In Heuser v. Harris, supra, the bequest of money was "to the poor of Madison county," the interest only to be used, with no appointment of a trustee. As the county court of Madison county was charged by law with the support of the paupers in the county, it was held in that particular case that the poor of the county were its paupers, and that the fund should be held by the county court to be applied for the latter's support. It is not to be the inference from that case that a charitable bequest to the poor necessarily means to paupers, and that the trust is only to be executed by somebody charged by law with the support of paupers. "A bequest in trust for the poor inhabitants of a particular place, parish, or town is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers; on the ground that the charity is for the poor, and not for the rich, and, if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor." Perry, Trusts, § 698.

It is said in Redf. Wills (2d ed.), p. 805, that some of the American cases have gone great lengths in carrying into effect the intention of the testator when there was great indefiniteness

in the objects of the trust; "that the want of a trustee in such cases is never any obstacle in the way of a court of equity carrying into effect any trust, and more especially one of a charitable character." Mr. Pomeroy, in speaking of the distinguishing features between charitable and private trusts, says that, in case of the former, "not only may the beneficiaries be uncertain, but that even when the gift is made to no certain trustee, so that the trust, if private, would wholly fail, a court of equity will carry the trust into effect either by appointing a trustee, or by acting itself in place of a trustee." 2 Pom. Eq. Jur. §§ 1025, 1026. And see Brown v. Kelsey, 2 Cush. 243; Washburn v. Sewall, 9 Metc. 280.

There can be no question of the general rule. But it is said it does not apply in a case where there is such indefiniteness as to beneficiaries as here. Numerous are the instances which might be cited where there was the want of a trustee, and the court executed the trust in cases of equal indefiniteness as here as to the objects of the trust. As in McCord v. Ochiltree, 8 Blackf. 15, where the legacy was for the education of the pious indigent youths; in Bull v. Bull, 8 Conn. 47, where the executors were to dispose of the residue of the estate "among our brothers and sisters and their children as they shall judge shall be most in need of the same," this to be done according to their best discretion, and the executors died never having exercised the power, nor executed the trust; in Williams v. Pearson, 38 Ala. 299, where the beneficiaries named were "all the paupers and poor children of two designated 'beats,' whose parents were not able to support them;" in Howard v. American Peace Soc., 49 Me. 288, where the gift was to the suffering poor of the town of Auburn. Where a legacy is given to trustees to distribute in charity, and they all die in the life-time of the testator, yet the legacy will be enforced in equity. 2 Story, Eq. Jur. § 1166. An extended collection of cases on the general subject may be found in note to Hesketh v. Murphy, 35 N. J. Eq. 23, and in 1 Jarm. Wills, 403, in note.

Mr. Perry sums up, as the result of the principles and authorities, that "a bequest for charity generally, * * * or to the poor generally, or to charity generally, with no trustees appointed, will not be carried into effect by the courts in this country." Perry, Trusts, § 729. That "if a testator makes a

general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint one, there is no power in the American courts to administer such an inchoate and imperfect gift." Id. § 731. That "it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be." Section 732. See, also, 2 Story, Eq. Jur. § 1169.

In the present case the testatrix appoints no trustee to distribute the fund, but expressly refers its distribution to a court of chancery. The power of distribution, in our opinion, carries with it the power to select the individuals to whom distribution shall be made. The trustee appointed by the court to make the distribution will have the incidental power to select the beneficiaries, so that the case stands the same as if the testatrix herself had appointed a trustee to distribute the fund. The trustee to be appointed by the court will, in effect, be a trustee of her appointment made through the court of chancery.

Courts incline strongly in favor of charitable gifts, and take special care to enforce them. As observed by Mr. Perry (§ 687), charitable bequests are said to come within that department of human affairs where the maxim ut res magis valeat quam pereat has been, and should be, applied; and, further (§ 690), that until the statute of distributions (22 Car. 11, c. 13) was enacted, the ordinary was obliged to apply a portion of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man. This shows the favor in which charity is held in the law. There is to be the most liberal construction of the donor's intention in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals. 2 Story, Eq. Jur. § 1165.

The charity here is not vague and indefinite, but quite specific,

to the worthy poor of the city of La Salle. Individuals of the class named will ever be readily found to whom the fund may be distributed. The trust is not difficult of execution according to the intention of the testatrix. Instead of herself naming a trustee to make the distribution of her bequest, the testatrix preferred that the distribution should be made by a court of chancery, whose peculiar province it is to effect the administration of trusts, and especially charitable trusts. There can be no doubt that the execution of the trust by such court would be to effectuate the donor's intention, the aim which is always sought to be accomplished.

Under the principles and the strong current of authorities which are properly applicable, we are fully satisfied that the bequest in question is a valid charitable gift, and that it should be carried into effect by a court of chancery, as the testatrix expressly willed that it should be. The residuary clause of the codicil being held valid, it follows that the complainants take nothing as heirs at law, and are not entitled to maintain their bill. The decree of the circuit court will be reversed, and the cause remanded to that court with directions to dismiss the bill. Decree reversed.

SCHOLFIELD, J., (dissenting). I do not concur in this opinion. I hold that courts of equity in this state exercise no prerogative powers, but, as contradistinguished therefrom, only judicial powers; that, not exercising prerogative powers, the court could not, by the act of the individual, be, and here is not, invested with a power not judicial, namely, that of selecting or designating the "worthy poor" to be the recipients of the testatrix's bounty; and that, since it has not been and could not be invested with such power, it cannot appoint and invest a trustee with such power. I concede the testatrix might have invested a trustee with such power, leaving and directing the court to appoint the trustee; but that is a very different case.

Constructive Trusts.

CURDY v. BERTON.

79 Cal. 420, 21 Pac. 858, 12 Am. St. Rep. 157. 1889.

McFARLAND, J. Madeline Curdy died February 9, 1877, in Alameda county, Cal. She left a will duly executed, in which, after bequests to several persons, including the plaintiff herein, there occurs the following: "I give in trust to Francis Berton, now Swiss consul in San Francisco, all the moneys I possess in France, and principally my share of the Italian rentes deposited in the bankinghouse of Messrs. Hentsch, Lutscher & Co., of Paris, to be distributed according to the private instructions I give him." Berton was present when the will was made, and wrote it for the testatrix at her request; and at the time of the making of the will she verbally instructed him to distribute said property or its proceeds to certain relations and others in France, other than the plaintiff herein, and gave him an order for said property. The facts in proof show that he at least impliedly agreed to accept the trust. After her death, and before the commencement of this action, said Berton faithfully distributed said property in accordance with the said instructions of said testatrix. This action is brought by plaintiff, a brother of the deceased, and one of her heirs-at-law, to have it decreed that Berton held the legal title to said property in trust for the heirs of said deceased, for an accounting, and for the payment to him of his proportionate share of said property, with interest, profits, etc. Francis Berton died during the pendency of the action, and his executor, George A. Berton, was substituted as defendant. The court gave judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial.

Upon the main point in the case the position of appellant is, in brief, that, as the statute law of this state requires a will to be in writing, therefore, "where a testator devises property, in trust to be applied to such uses as the testator has verbally specified to the devisee, the trust attempted to be created by parol fails, and the devisee takes the property in trust for the heirs of the testator." The contention of respondent is, in brief, that, independent of the statute of wills, where a testator

bequeaths property in trust to a legatee without specifying in the will the purposes of the trust, and at the same time communicates those purposes to the legatee orally, or by unattested writings, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, there a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise. We think that respondent's view of the law, as above stated, is correct. There are some cases which support the proposition of appellant, notably the case of Olliffe v. Wells, 130 Mass. 221; but the weight of authority and the better reason are the other way.

Obviously, the clear intention of the testatrix, as expressed in the written will, was that the property in question should not go to plaintiff. He, however, says, in effect: "True, the property was not to come to me. It was given to Berton upon the understanding, between him and the testatrix, that it was to go to the benefit of certain other persons; but, as they cannot establish their rights as beneficiaries, according to the statute of wills, Berton must be held to be my trustee, against the intention of the testatrix. I stand upon what I claim to be the dry law." Evidently, in a doubtful case, no just impulse would move a court to lean towards a proposition involving such consequences; and, as the question is an open one in this state, we are at liberty to follow those authorities, and that line of reasoning which appear to us to be most in consonance with the true principles of equity and justice.

We find in the Case of O'Hara, 95 N. Y. 403, a very full statement of the considerations which, in our opinion, ought to govern the decision of the case at bar. In that case the testatrix, by her will, practically disinherited her relations in favor of strangers, giving the bulk of her estate to three legatees, who were her lawyer, her doctor, and her priest. The will was attacked by the heirs, on the ground of want of testamentary capacity and undue influence. As there was considerable evidence to support these charges, the legatees finally, to establish

some reasonable explanation of a diversion of the estate to strangers having influence from confidential relations, showed that they were not to have any beneficial interest in the estate, but were to devote it entirely to certain charitable uses, according to instructions given them by the testatrix at the time the will was made. It appeared, however, that these charitable uses were in direct violation of the statute law of the state. The heirs at law then began an action in equity to establish a trust, which, failing as to the intended beneficiaries on account of illegality, should result to them. The legatees then, although intending to carry out the wishes of the testatrix, stood upon their rights under the terms of the will, which upon its face gave them the property absolutely; denied that they had accepted any trust, or that any could be proven by extrinsic matter lying outside the will; and insisted that the property was theirs absolutely. The question thus presented was, in substance, the one presented here. The only difference is that in the O'Hara Case the instructions were in writing, while in the case at bar they were oral. But neither in the argument of counsel, nor in the opinion of the court, was there any distinction made between written and oral instructions or promises. The principles announced applied equally to both. There was no claim that the letter of instructions came within the rule that an extraneous paper may be incorporated into a validly executed will by a direct reference to it in the will itself. There was no reference whatever in the will to the letter. The court in the O'Hara Case, after stating that "the proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions," proceeds to discuss the question whether or not one of the legatees, McCue, expressly promised to accept the trust. After reviewing the evidence (which was somewhat contradictory) on that point, the court says: "Where, in such case, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him, to be applied by him to the benefit of others, it has all the force and effect of an express promise. Wallgrave v. Tebbs, 2 Kay & J. 321; Schultz' Appeal, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation

which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud. Russell v. Jackson, 10 Hare, 204." The court then proceeds to state the principles which should determine the main question under discussion, as follows: "If, therefore, in her letter of instruction, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts, in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor, which equity will not endure. The authorities on this point are numerous." (Here follows a long list of cases.) "The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. Brown v. Lynch, 1 Paige, 147; Williams v. Fitch, 18 N. Y. 546. In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval, and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust ex maleficio, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in Glass v. Hulbert, 102 Mass. 40. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement, while repudiating its obligation under cover of the statute.'" The other parts of the opinion discuss the question whether, as the charitable uses could not be enforced, because forbidden by the statute, the legatees could be held as trustees for the heirs, but that question does not arise in the case at bar.

We have thus referred at length to the O'Hara Case because it contains a lucid statement of the principles which apply to the case at bar, and for the additional reason that in the opinion of the court and the briefs of counsel nearly all the authorities bearing upon the question are cited. We also refer especially to the case of Williams v. Vreeland, 32 N. J. Eq. 135, which declares the doctrine above stated; and in the notes to which are collated extracts from about 40 different cases, all of which are confirmatory of said doctrine. See, also, Hooker v. Axford, 33 Mich. 453; In re Fleetwood, L. R. 15 Ch. Div. 594; In re Boyes, L. R. 26 Ch. Div. 531; and Riordan v. Banon, 10 Ir. Eq. 469. The cases cited will show that it is immaterial whether the instructions given by a testator are oral or in writing. Indeed, in the opinion of the court in the O'Hara Case (above quoted), where the phrase "lying in parol, or unattested papers" is employed, the word "parol" is evidently used in its usual meaning, as synonymous with "verbal" or "oral," and not in its broader meaning of "not under seal." The California cases of De Laurencel v. De Boom, 48 Cal. 581; Estate of Shillaber, 74 Cal. 144, 15 Pac. Rep. 453; and Estate of Brooks, 54 Cal. 475,—while in harmony with the principles above stated,—are not directly to the point involved in the case at bar. Our conclusion is that the court below correctly decided that Francis Berton, deceased, properly distributed the property in France, in accordance with the instructions given him by the testatrix when the will was made, and which instructions he, at that time, agreed to carry out. Of course, the case must be distinguished from one where a testator, intending to give certain property directly to a certain person, for that person's sole benefit, fails to designate in the will either the property or the person. In such a case no question of trust could arise. These views make it unnecessary to determine the other two points made by respondent: (1) That the order for the property in France, given by the testatrix to Berton at the time the will was made, constituted a transfer of the property in præsenti; and (2) that the action was barred by the statute of limitations. The judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

CHAPTER IX.

OTHER EQUITABLE PROPERTY RIGHTS—ADMINISTRATION OF ESTATES.

Equitable Conversion.

WHELESS v. WHELESS et al.

92 Tenn. 293, 21 S. W. 595. 1893.

CALDWELL, J. Gen. John F. Wheless died intestate and without issue, leaving a widow, and numerous collateral kindred. The bill in this cause was filed for a partition of his lands, when that could be done, and for sale and division of proceeds, where partition in kind might not be practicable. The widow, in her answer, claimed that the undivided interest of her husband in what is known as the "Baxter Smith Tract" was not realty, but personal property, under the doctrine of equitable conversion, and that it therefore belonged to her, as distributee, and not to the heirs. The chancellor decided this question against her, and she appealed.

No doctrine is more firmly fixed in English and American jurisprudence than that of equitable conversion, by which, under certain circumstances, real estate is treated, in equity, as personal property, and personal estate as real property. Through this doctrine, courts of equity treat as land money directed to be employed in the purchase of land, and, as money, land directed to be sold and converted into money; and the direction upon which the conversion arises may be made by will, or by deed, settlement, or other contract inter vivos. Adams, Eq. *135, 136; 1 Pom. Eq. Jur. § 371; 2 Story, Eq. Jur. § 790; 4 Amer. & Eng. Enc. Law, 127; 6 Amer. & Eng. Enc. Law, 664, 665. It was early recognized in this state (Stephenson v. Yandle, 3 Hayw. [Tenn.] 109), and has since been applied in several cases upon the construction of wills. McCormick v. Cantrell, 7 Yerg. 615; Williams v. Bradley, 7 Heisk. 58; Green

v. Davidson, 4 Baxt. 448. The difficulty which sometimes arises in the application of the principle to a particular instrument lies, not in the subtlety of the principle itself, but rather in ascertaining the intention of the maker from the words employed.

To operate as a conversion, the direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not, as he deems best, the courts are not at liberty to say that a conversion has taken place, but must deal with the property according to its actual form and character. 2 Story, Eq. Jur. § 1214. Mr. Pomeroy says: "No express declaration in the instrument is needed that land shall be treated as money, although not sold, or that money shall be deemed land, although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land shall be sold, and turned into money, or that the money shall be expended in the purchase of land. * * *

The true test, in all such cases, is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal, or the personal estate be turned into real?" 3 Pom. Eq. Jur. § 1159. Again: "The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting upon the trustees or other parties to do the specified act; or, unless the equitable 'ought' exists, there is no room for the operation of the maxim, 'Equity regards that as done which ought to be done.' The rule is therefore firmly settled that, in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear, imperative agreement in the contract, to convert the property; that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting—that is, the act, itself, of selling the land, or of laying out the money in land—is left to the option, discretion, or choice of the trustees, or other parties, then no equitable conversion will take place, because no duty to make the change rests upon

them. It is not essential, however, that the direction should be express, in order to be imperative. It may be necessarily implied. * * * If by express language or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place." Id. § 1160. To the same effect are Wait's Ex'rs v. Page, 19 N. J. Eq. 375; Ford v. Ford, 70 Wis. 19, 33 N. W. Rep. 188; Hobson v. Hale, 95 N. Y. 588. Numerous other authorities, textbooks, and judicial decisions are at hand; but they are, in the main, so harmonious, and so entirely in accord with the full quotations just made from Mr. Pomeroy, that we forbear to make further citations with respect to the character of direction necessary to work the notional change, and call the doctrine of equitable conversion into play. As a matter of some moment on the question of construction, it is well to observe that unless the sale or purchase contemplated is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, which may or may not happen, the conversion takes place, in wills, as from the death of the testator; and in deeds, and other instruments inter vivos, as from the date of their execution. 3 Pom. Eq. Jur. § 1162.

The instrument upon which the controversy arises in this cause is a deed, in the following language: "We, Baxter Smith and wife, Bettie G. Smith * * * in consideration of the sum of $34,395.60, paid and secured to be paid as hereinafter mentioned, have bargained and sold, and do hereby transfer and convey, unto James H. Yarbrough, in trust, as hereinafter mentioned, the following tract of land * * * to have and to hold, for himself and other beneficiaries hereinafter named, in trust for the following uses and purposes: That is to say, said tract of land has been jointly purchased by James C. Warner, Percy Warner, John P. White, John F. Wheless, B. F. Wilson, W. M. Grantland, Charles L. Ridley, Baxter Smith, and J. H. Yarbrough, L. H. Davis, and G. A. Maddux,—the last three purchasing as a firm, under the firm name and style of Yarbrough, Maddux and Davis,—each paying and to pay one tenth of the purchase money for said land, as hereafter set out, except John P. White, who pays two tenths. * * * Said tract of land is conveyed to said J. H. Yarbrough, as trustee for said

named purchasers, with power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct, and to collect and divide the proceeds of sale among said beneficiaries, their heirs, administrators, executors, and assigns, as their several interests may appear. The aforesaid sum of $34,395.60 has been paid, and secured to be paid, as follows: * * * To secure the payment of the promissory notes herein described, a lien is expressly retained upon the share or interest of the maker alone and not against the tract as a whole. In case any of the beneficiaries herein named, in order to preserve his or their own title, should have to pay and discharge for another any accruing taxes or other incumbrance or lien upon the whole property, then, in that event, he or they shall have a lien upon the share or interest of the person who has failed to make such payment. Should said J. H. Yarbrough desire to resign the trust herein given him, he may do so, by and with the consent and approval, in writing, of a majority in value of the adult beneficial owners named above, and appoint in his room and stead a new trustee, and clothe him with like power and duties as those now conferred on him, by a suitable deed of conveyance in writing, to be recorded in the register's office of Davidson county, Tennessee."

Such are the material portions of the instrument the court is called upon to construe in this case; and the inquiry is whether the land conveyed thereby is to be treated, in equity, as realty, or as personalty. If as realty, the share of Gen. Wheless passed to his heirs, under the statute of descent; if as personalty, it went to his widow, as sole distributee, subject in either case, of course, to his debts.

A general view of the deed readily discloses a proposed speculation, entered into by several persons jointly,—a syndicate buying land to sell again. In furtherance of the scheme a trustee was appointed, and the land conveyed to him for the benefit of all the purchasers,—for each of them according to his interest. The idea of a resale, as the ultimate object of the enterprise, runs through the whole instrument. It appears from the nature of the transaction, from the words conferring upon

the trustee power and authority "to sell, * * * and collect and divide the proceeds," and from the provision for appointment of a successor in case the trustee should resign, that a partition in kind should ever occur, or that the trust should cease before a sale of the land and division of its proceeds were fully accomplished, was never contemplated. The land was bought to sell again, and a trustee was appointed as a part of the plan.

All this is clear; but it is entirely consistent with the proposition that the trust was created merely as a cheaper and more convenient method of preserving and conveying the land. More is required to make a case of equitable conversion. The fact of a contemplated resale is present in every purchase of land upon speculation; and land purchased with such view is not converted into personalty by the mere appointment of a trustee to receive the title, and as the agency through which the resale is to be accomplished for the owners. It is manifest that the paramount object of the enterprise was a resale of the land through the trustee, as representative of the beneficial owners, yet the deed does not contain any imperative direction that he shall sell; no absolute, unconditional duty to sell is placed upon him. "The equitable 'ought'" is not to be found in the deed, either as a matter expressed or to be necessarily implied.

Not only does it contain no positive direction that he shall sell, but it, in reality, does not even permit him to sell, upon his own motion. His only power of sale is made to depend, expressly, upon the direction of others. He has no independent authority in that respect. The words of the deed on this point are: "With power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct." This language imposes upon the trustee no positive, unqualified obligation to sell the land at all events. At most, it but gives him authority to sell at such time, and upon such terms and conditions, as others may direct. In effect, it but makes him the instrumentality through which a majority of the beneficial owners living at any given time may make a sale. He has no right

to sell without their written direction, and no authority to demand or require such direction at one time or another. It cannot be that a conversion was wrought by the creation of a trust so passive as this one is.

To meet the fact that the trustee has no power to sell unless directed by a majority of the adult beneficiaries to do so, it is suggested that the beneficiaries themselves are clothed with a trust, to the extent of being empowered to direct when and how the sale shall be made, and that they are bound to give such direction.

There can be no doubt that it was contemplated that the beneficiaries should at some time give the trustee the required direction to sell the land, and that a duty was, to that extent, indirectly devolved upon them; but that can hardly be said to have made trustees of them, or to have magnified the limited power of the real trustee into an imperative obligation to convert the land into money. The purchasers, though intending an ultimate sale, clearly had no thought that the terms of the deed changed the character of the property, and converted the real estate into personalty. That they intended the land to be held as realty until actually sold and turned into money is manifest from the general frame and terms of the deed, and especially from those parts of it retaining separate liens in favor of the grantor, and providing for a special lien in favor of such beneficiaries as might be compelled to pay taxes or discharge liens for others.

In the portions of the deed last referred to, the interest of each of the several beneficiaries is referred to as an interest in land, as such, and provisions are made with reference thereto which would be inappropriate as applied to personalty. We are of opinion that the deed shows upon its face, when considered as a whole, that the land was conveyed to a trustee merely for convenience, and to save expense and trouble in the ultimate sale and conveyance, and that no conversion took place.

Our attention has been called to the very instructive and soundly reasoned case of Crane v. Bolles (N. J. Ch.), 24 Atl. Rep. 237, in which a conversion of land into money was held to have occurred under direction contained in a will. There are several points of similarity between that case and this one, and perhaps as many important differences. The principles of law

laid down in that case are the same recognized and applied by us in this one, the difference in result reached being due to difference in purport of instruments construed. Without stating the aspects in which the two instruments agree, or those in which they differ, we are content with simply saying that the court in that case said that the direction for sale was "imperative," and did not depend on the "request or consent" of the testator's children, while in this case there is no imperative direction to sell, and the power to sell does depend on the direction of the beneficiaries. Affirm the decree.

CHAPTER X.

MORTGAGES.

Lien Theory.

CHICK v. WILLETTS.

2 Kan. 384. 1864.

By the Court, CROZIER, C. J. Two questions are presented by the record: First, Which law, the twentieth section of the code, or the second section of the "amendatory Act," prescribes the limitation; and second, When an action upon a promissory note, secured by a mortgage on real estate, is barred by the Statute of Limitations, has the mortgagee any remedy upon the mortgage? These are the facts: On the sixth day of April, 1858, at Kansas City, in the State of Missouri, the defendant executed to the plaintiffs his promissory note, payable one day after date. Afterwards, and on the 12th day of August of that year, the defendant, to secure the payment of the note, executed, in this state, a mortgage upon some lots, which mortgage contained a stipulation that if default was made in the payment of the note for two years from the date of the mortgage, that instrument might be foreclosed, etc. On August 13, 1863, a suit was instituted upon the note and mortgage, and the facts, as above stated, being admitted, judgment was rendered for the defendant. To reverse that judgment, this proceeding is instituted.

The note having been made in Missouri, would, under the act of February 10, 1859, have been barred in two years from the passage of that act, if there were nothing else to be considered. By a stipulation in the mortgage, the time of payment was deferred two years from August 12, 1858.

The mortgage having been made in this state, was the arrangement, with reference to our Statute of Limitations, a Kansas or Missouri contract? Although no change was made upon the face of the note, yet the clause of the mortgage referred to was

effective to change its terms as if written across its face. The time of its payment, with reference to the land, was extended two years. Its payment, as against the land, could not be enforced before that time; nor would the limitation laws begin to run against it until the expiration of that time. These changes in the original contract were effected by the paper which was executed in this state. The contract evidenced by the mortgage is essentially different from that set out in the note, and must control it. Therefore, the contract, as it stood, after the making of the mortgage, was a Kansas contract, and would not be barred in two years.

The Statutes of Limitation of this state are wholly unlike the English statute, and differ materially from the limitation laws of those states which have adhered to the common-law forms of action and modes of procedure. Those statutes apply, in terms, to the form of the action at law, and contain no provisions concerning an equitable proceeding. If a party had concurrent remedies, one at law, the other in equity, courts of equity applied the limitation prescribed for the action at law. But in all other cases, they were said to act merely in analogy to the statutes, and not in obedience to them.

In this state, the case is entirely different. The distinction between actions at law and suits in equity is abolished; and the Statutes of Limitation apply equally to both classes of cases. They were made to apply to the subject-matter, and not to the form of action. In England and the states referred to, a limitation different from that prescribed for simple contracts in writing, was prescribed for specialties. Here, "an action upon a specialty, or any agreement, contract, or promise in writing," must be brought within three years; and it matters not what the relief demanded may be, whether such as could formerly be obtained only in a court of law, or such as might have been afforded by a court of equity exclusively.

Mortgages here differ essentially from mortgages at common law, and in the states referred to. At common law, a mortgage was a conveyance with a defeasance, and gave the mortgagee a present right of possession. Upon it, even before the conditions were broken, he might enter peaceably or bring ejectment. If the condition was broken, the conveyance became absolute. If the money was paid when due, the estate reverted to the mort-

gagor; if not so paid, the estate was gone from him forever. After a time, the law of mortgage was so modified that the legal title was not considered as having passed until the condition was broken. At a later day, another still more important innovation was made. While it was considered that, upon condition broken, the mortgagee became invested with the legal title, and was entitled to possession, yet, in that condition of things, his title was subject to a defeasance. The rents and profits operated as cancellation, pro tanto, of his conveyance; and when they reached a sum sufficient to reimburse his original investment, with such use as the law allowed, the legal title reverted to the mortgagor, and he would be entitled to the possession; and he had a right to facilitate this operation by payment of the money, and upon application to a court of equity, his title would be disencumbered of the cloud the mortgage cast upon it. This right of the mortgagor was called "the equity of redemption," and, considering the then prevalent theory of mortgages, the phrase was peculiarly appropriate and expressive. The title had passed, but he had a right to redeem; and it is among the highest glories of equitable jurisprudence, that at so early a day the means of enforcing this right were supplied. Some of the states still adhere to the common-law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theories is their nomenclature. In this state, a clear sweep has been made by statute. The common-law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negativing any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition is broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that

the security shall not be impaired. He may sell it, and the title will pass by his conveyance—subject, of course, to the lien of the mortgages.

If we are right in these views as to our Statute of Limitations, and the operation of a mortgage under our law, the English cases and cases in New York and Ohio, cited by counsel for plaintiffs, have no application to the case at bar. The Statutes of Limitation under which they were made make distinctions between notes and mortgages which do not exist here; and the operations of notes and mortgages there and here are totally different. The decisions are not authorities in this case, for the reason that they are not applicable, and cannot be made so. If our limitation law omitted mortgages, and our law of conveyances gave the right of possession to the mortgagee, some of them would be in point; but as neither of these conditions exists here, they throw no light upon the questions under consideration in the case at bar.

Our conclusions are, that the twentieth section of the code prescribes the limitation to an action on the note or mortgage, and as the three years expired on the 12th day of August, 1863, a suit commenced on the 13th was too late.

Judgment affirmed.

All the justices concurring.

No Mortgage Without Right of Redemption.

NOAKES & CO., LTD., v. RICE.

L. R., App. Cas. 24 (Eng.). 1902.

The respondent, a licensed victualler, in 1897, bought a public house held under a lease expiring in 1923. Before the purchase the appellants, who were brewers, had a mortgage on the house with a covenant similar to the one now in question. The appellants released their security to enable the second mortgagees to sell the house. The respondent not being able to find all the purchase money, part was advanced by the appellants upon a mortgage by the respondent of the leasehold premises, good-will, etc., subject to a proviso that if the respondent should pay all the moneys and interest due on the security the appellants should surrender or re-convey the premises to the respondent or as he

should direct. In the mortgage deed the respondent covenanted, in the terms more fully set forth in both the reports below, (1900) Ch. 213; (1900) 2 Ch. 445, to the effect that, so as to charge the premises into whosesoever possession they might come, and to the intent that the obligation of the covenant might run with the land, the respondent would not at any time during the continuance of the term, whether any money should or should not be owing on the security, use or sell upon the premises any malt liquors except such as should be purchased by the respondent of the appellants.

The respondent being desirous to pay off all money due on the security and to obtain a reconveyance or transfer, with a release from the covenant in question, brought an action against the appellants, claiming a declaration to that effect.

Cozens-Hardy, J., made an order declaring that upon payment by the respondent to the appellants of all moneys due, the respondent was entitled to a reconveyance of the property, together with a release of all covenants contained in the mortgage, or at his option to have the property transferred to a transferee with the benefit of all covenants contained in the mortgage; and that in either case the appellants were not thereafter entitled to the benefit of the covenant in question. This order was affirmed by the Court of Appeal (Lord Alverstone, M. R., Rigby, and Collins, L. JJ.).

LORD DAVEY. My Lords, there are three doctrines of the courts of equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim, "Once a mortgage, always a mortgage." The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

My Lords, the first maxim presents no difficulty: it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of the Marquis of Northampton v. Salt, (1892) A. C. 1, the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was compromised

in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed.

My Lords, the second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago, when the usury laws were in force. The Court of Equity went beyond the usury laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view the court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of Biggs v. Hoddinott, (1898) 2 Ch. 307, in the Court of Appeal was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: Once a mortgage, always a mortgage, and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinion expressed by my noble and learned friend opposite (Lord Lindley), when Master of the Rolls, in the case of Santley v. Wilde, (1899) 2 Ch. 474. He says: "A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But I ask, "security" for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two ele-

ments in the conception of a mortgage: first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off, the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess I should have decided the case of Santley v. Wilde, supra, differently from the way in which it was dealt with in the Court of Appeal. After the payment of principal and interest, and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption.

By the Conveyancing Act a mortgagee may now be required to transfer his mortgage on payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule.

Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemp-

tion; and secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void.

My Lords, I only desire to add that, with my noble and learned friend by my side (Lord Macnaghten), I cannot assent altogether to the assumption made by Cozens-Hardy, J., that the covenant constituted or might constitute a good charge upon the property by virtue of the operation of the doctrine in Tulk v. Moxhay, (1848) 2 Ph. 774. I should hesitate some time before I assented to that proposition; but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.

My Lords, upon these grounds I agree with the motion proposed by my noble and learned friend.

CHAPTER XI.

EQUITABLE LIENS—ASSIGNMENTS.

Equitable Liens.

DAVIS v. CLAY.

2 Mo. 130. 1829.

WASH, J., delivered the opinion of the court.

In this cause a bill was filed by the complainant against the defendant and one Scott, to foreclose a mortgage, etc. The Circuit Court decreed the foreclosure, sale, etc., from which Davis appealed to this court.

The facts are, that on the 23d of June, 1821, the above named defendant, Scott, executed a covenant, real mortgage, or instrument in writing, to the testator, Morrison, in the words following, to wit: "To all to whom these presents shall come: Whereas, I, John Scott, in the county of Ste. Genevieve and State of Missouri, am justly indebted to Col. James Morrison, of the county of Fayette, in the State of Kentucky, in the sum of three thousand eight hundred and thirty-eight dollars and sixty-six cents, lawful money of the United States, to bear interest from the date hereof; for which sum, said Scott has executed his note of equal date with these presents, till full and perfect payment. Now know ye, for the better securing unto the said Morrison, his heirs and assigns, the full and perfect payment of the said sum, on or before the first day of March next ensuing; that I, the said John Scott, for myself, my heirs, executors and administrators, do covenant, promise and agree to and with the said James Morrison, his heirs, executors, administrators and assigns, that the undivided interest of one-third part of, in and to, a certain tract of land, known by the name of the Saline tract, in the county of Ste. Genevieve and State of Missouri, owned in common with Henry Dodge and the heirs of Edward Hempstead, containing about twelve thousand arpents more or less, being the same that was purchased by said Dodge, Hempstead and Scott, as the prop-

erty of Mr. Peyroux; and also, as the property of Mr. Maxwell, as by deeds of record will fully appear, and every part and parcel thereof shall stand charged and chargeable with, and stand, continue, and be a security unto him the said Morrison, his heirs, executors, administrators and assigns, as well for the payment of the principal as the interest thereon, until the same shall be fully and finally paid and satisfied according to the true intent and meaning of these presents; reserving, however, to the said John Scott, his heirs and assigns, the rents and profits of the said land and saline, above and before securited and mortgaged," etc.; which was regularly acknowledged and recorded on the day of its date, and of which the defendant Davis had full notice; that after the execution of said instrument in writing, a judgment was obtained against said Scott, under which the premises were seized and sold to the defendant Davis, for the consideration of one dollar.

The questions presented for consideration are:

First. Whether the instrument be valid as a legal mortgage, etc.?

Second. If not a mortgage in law, whether it can be an equitable lien?

The instrument is imperfect and defective as a legal mortgage, but it may well be regarded as an equitable mortgage.

An agreement respecting real estate, for good consideration, imposes a lien as against persons having notice, etc. 4 Brown Ch. s. 31-4, Brow. Ch. 462, P. Wms. 282 and 429. If an equivalent be given, though the contract be not executed with all the formalities of law, yet in equity, the use is in the purchaser, etc. Gibb. Uses, 49 Eq. 30.

The decree of the Circuit Court is, therefore, correct, and must be affirmed with costs.

PART III

GENERAL PRINCIPLES AND DOCTRINES OF EQUITY

CHAPTER XII.

DOCTRINES RELATING TO ACCIDENT, MISTAKE, AND FRAUD.

Constructive Fraud—Inadequacy of Consideration.

SUMMERS v. GRIFFITHS.

35 Beavan 27 (Eng.). 1866.

THE MASTER OF THE ROLLS, without calling for a reply, said:

I am of the opinion that the plaintiff is entitled to a decree. The state of the case, as put by the defendant himself, is that an old woman of the age of eighty-nine, in distress for money, and having a doubt about the title to the property, comes to him and asks him to buy it at one-fourth or one-fifth of its value, and that she, having no species of legal assistance of any sort, makes that offer to him. He assents and buys it at that amount, having at the time in his hands the title to her property, and knowing or having the means of knowing exactly what her title was, and having told her at first that she could make no title to it, or that if she was entitled to it her husband probably was not, he having the deed probably showing how long the husband had had the property, and that she had then had thirty years' uninterrupted possession of the rent charge. Thereupon he buys the property for one-fourth its value. This is the most favorable mode of stating the case, and I am then asked to say that if the matter were fresh, this is a transaction which can be supported, and the only reason urged why it can not be supported is that the bill charges fraud. No person, I think, has been more strict than I have in endeavoring to repress the improper uses of the word "fraud" in regard to transactions which are neither of an

improper nor of an immoral character—I mean immoral in the sense of taking advantage of a person who does not know what the value of his property is. I do not understand the distinction of the subject taken in the case of Harrison v. Guest. There appears to me to be distinct fraud in this case, and on that ground I am of opinion that the plaintiff is entitled to recover.

It is true the plaintiff has put forward another case on the bill, which is that Mary Lloyd intended to sell her life interest only, and there is some ground for that suggestion on the evidence; but here is this man who knows everything about the title, and who admits (in the state of circumstances I have mentioned) that he allowed this old woman to sell the property to him for one-fourth its value, she believing there was a defect of title. If that be not fraud, I am at a loss to know what the meaning of the word "fraud" is in the proper and legal sense of the word. If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title, while I know that he can, and I conceal that knowledge from him, is not that a suppressio veri, which is one of the elements which constitute a fraud?

I am of opinion that the plaintiff in this case is entitled to a decree to set this deed aside, on payment to the defendant of the principal sum and interest after deducting the tithes he has received. The plaintiff must pay the costs of the other defendants, because, in my opinion, they ought all to have joined as co-plaintiffs.

There is this also to be observed with respect to the question of time, that ten years have elapsed, and this old lady took no steps in her lifetime. She died in 1862, and neither the son nor his assignee took any steps until March, 1864, when the bill was filed. But then I observe that there are persons who are interested in remainder, some of whom are infants and cannot be bound by that lapse of time, though it is absolutely necessary that there should be some limit to these cases.

It is true, as Mr. Jessel says, that mere inadequacy of value is not sufficient ground for setting aside a transaction. But how far is that to go? Is there to be no such inadequacy of value as can amount to evidence of fraud? Lord Thurlow said that to set aside a conveyance there must be an inequality so strong,

gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. Tried by this test, I am satisfied that most men of common sense would exclaim at the inequality, when they found that an old woman of eighty-nine had sold property for one-fourth of its value because she was in distress, and that without any legal assistance and without any person letting her know that she could make out a good title and obtain four or five times that amount.

Fiduciary Relations.

LILES v. TERRY.

L. R., 2 Q. B. 679 (Eng.). 1895.

Appeal from the judgment of Charles, J., without a jury.

The action was brought to set aside a deed dated October 18, 1892, and made between the plaintiff Jane Liles of the one part, and John Frederick Terry (the male defendant) of the other part, whereby the plaintiff, in consideration of the natural love and affection she had toward Mary Rose Terry (the female defendant), assigned to the said J. F. Terry two leasehold houses in the parish of St. Mary, Newington, subject to the payment of the rent and performance of the covenants under the lease, in trust to pay the rents and profits to the plaintiff during her life, and after her death to her sister, Frances Hogg, widow (who had died before the action was brought), during her life, and after her death upon trust for the said Mary Rose Terry, for her separate use and benefit absolutely.

The facts were as follows:

The male defendant was a solicitor. The female defendant was his wife and the niece of the plaintiff. It appeared that the plaintiff, who was a spinster of about seventy-seven years of age, had been engaged in litigation with respect to property of which the houses assigned by the deed in question formed part, and had said that she would leave the houses by will to Mrs. Hogg, the female defendant's mother, for life, and after her death to the female defendant, if the male defendant would act as her solicitor in the matter without making any charge, and he had accordingly so acted. Subsequently the plaintiff saw the male

defendant, and told him that she desired to make her will. On October 18, 1892, she went to a boarding-house in London, at which the male defendant was then staying, for the purpose of executing her will. The defendant then produced a will which he had caused to be prepared, and she executed it. By this will, which did not mention the houses in question, the plaintiff, after bequeathing certain legacies, devised and bequeathed the residue of her real and personal property to her four nieces. The male defendant then produced the deed in question and asked her to sign it, which she did. She stated in her evidence that she asked what it was, and he told her that it was a separate deed for the two houses; and that she then said that she did not understand why it was not all in one paper. She further stated that she was not asked whether she would have independent professional advice in the matter, and that the deed was not read over or its contents explained to her, and that she was not told that the deed was irrevocable, and did not understand it to be so. On the other hand, a witness named Pearson, an architect, unconnected with the parties, who was staying at the boarding-house and was present when the deed was executed, was called for the defendants, and stated that the male defendant told the plaintiff that one of the documents which he had brought was a will, and the other a deed, and explained the effect of them to her, and that she then signed them, and said she was glad the matter was settled. The male defendant was not able to give evidence at the trial on account of his mental condition. It was contended for the plaintiff at the trial that the deed was invalid, being a voluntary conveyance in favor of the wife of the assignor's solicitor; and further, that, even if it were not a voluntary conveyance, such a conveyance was invalid, the assignor not having had independent professional advice in making it.

The learned judge came to the conclusion upon the evidence that there was nothing to show any undue influence or unprofessional conduct on the part of the male defendant; that the plaintiff had had the matter thoroughly explained to her, and that her intention was to have it carried out by the deed she executed. He held, on the authority of Price v. Jenkins, that the assignment was not voluntary, because it imposed on the assignee a liability in respect of the rent of the premises and the covenants in the lease; and that, there having been nothing in the nature

of undue influence or deception, but the whole matter having been fully and fairly explained to the plaintiff, who in the learned judge's opinion thoroughly understood what she was doing, and did it with the intention of benefiting her niece, the deed was not invalid. He therefore gave judgment for the defendants.

LORD ESHER, M. R. In this case the question appears to me to be whether, by virtue of a definite rule of equity, the court is bound to set aside this conveyance which has been executed by the plaintiff. I take the facts in truth to have been, and the learned judge appears to have found, that the plaintiff, when she signed this deed, intended to do so with the effect of making an assignment of this property in favor of her niece, the wife of the solicitor, and that she knew that she could not afterward alter it and intended to bind herself irrevocably by it. I think the learned judge has found, and I believe it to be the truth, that the difference between a deed which would have that effect and a will which would be revocable was fairly and fully explained by the solicitor to her before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her. Although that was the case, and although she executed the deed, as I believe, not with the intention of benefiting the solicitor, whom in point of law it did not benefit, but with the exclusive intention of benefiting her niece, yet, as I understand the doctrine laid down by the courts of equity on the subject, there is a positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, and the plaintiff had not the advice of an independent solicitor, therefore the gift which the plaintiff intended to make for the benefit of her niece was invalid; or in other words, according to the authorities by which the rule of equity on the subject is determined, there is in such a case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence. It appears to me that that is the rule on the subject which has been laid down in the cases to which we have been referred, such as Rhodes v. Bate, L. R. 1 Ch. 252. I must submit to that rule. I own that I think it unfortunate that such a rule should have been laid down, because

in particular instances it may work great injustice; and I do not think that a hard and fast rule which may work such injustice ought to be the rule of law in the matter. But I feel bound by the authorities to hold that there is such a rule in equity. On that ground only, and believing the facts as found by the learned judge to be the truth of the matter, I think the female defendant must lose the benefit which the plaintiff, her aunt, intended to confer upon her, and this appeal must be allowed.

LOPES, L. J. I have come to the same conclusion. I am sorry to differ from any view expressed by the Master of the Rolls, but I must differ from his comment on the rule of equity on this subject. I cannot consider it an unfortunate rule. It appears to me to be a hard and fast rule which is founded on public policy. In exceptional cases it may possibly work hardship; but in the generality of cases it is in my opinion highly beneficial, and I should regret to see it altered. I think the cases establish the rule that such a gift as this made by a client to his solicitor, whilst the relation of solicitor and client, or any influence arising from it, exists, is invalid. The relation of solicitor and client must be entirely at an end before such a gift can be validly made. I do not think that evidence of any explanation by the solicitor of the document or any assistance given by him to enable the client to understand the effect of it is of any avail to prevent the application of this general rule. What the solicitor ought in such a case to do is to suggest to the client that in order to make the gift effectual the client should procure independent professional advice. I will not refer to the authorities that have been cited at length. The judgment of Turner, L. J., in Rhodes v. Bate, L. R. 1 Ch. 252, at p. 257, seems to me to show that the rule on the subject is inflexible. He says: "I take it to be a well-established principle of this court, that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." In the view I take it is unnecessary to discuss the effect of the evidence in this case. I am not prepared, however, to say that I should come to the same conclusion as the Master of the

Rolls as to the effect of it; but that is immaterial, because we are acting on the rule which I have mentioned. It appears to me clear from the cases that no distinction can be recognized between a gift made to a solicitor himself and one made to his wife. It is obvious that a solicitor might benefit largely by a gift to his wife, and there would be a similar temptation to exercise undue influence in respect of such a gift. The wife might make over the property to him the day after it had been given to her. For these reasons I think this appeal must be allowed.

KAY, L. J. I must say with deference that I cannot agree with the view expressed by the Master of the Rolls with regard to the rule of equity on this matter. It appears to me to be a rule of public policy of great importance that, while a person is under the influence or presumed influence of another person in consequence of a confidential relation between them, that another person cannot accept from him a gift of any kind, unless it is shown to have been made with competent independent advice, which I take to mean independent advice of a professional nature. The rule on the subject is laid down by Lord Erskine in Wright v. Proud, 13 Ves. 136, thus: "So, independently of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be not only free from fraud, but the most moral in its nature." Lord Eldon, dealing with the same subject in Hatch v. Hatch, 9 Ves. 292, says: "This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand purporting to be bounty for the execution of antecedent duty." It may be observed that there is a slight difference between these two statements of the rule. In the earlier case it is said that an attorney shall not take a gift from his client; whereas Lord Eldon says it is almost impossible that the transaction shall stand. But what was said by Turner, L. J., in Rhodes v. Bate, L. R. 1 Ch. 252, seems to explain this slight difference between the two statements. He there says that in the case of merely trifling gifts the court would not interfere to set them aside upon the mere fact of a confidential relation and the absence of

proof of competent and independent advice. But with regard to all other gifts he lays it down as a strict rule that "persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." I cannot conceive a wiser rule than this, or one more calculated in most cases to ensure the observance of justice and equity between parties in such a confidential relation. It applies to the case of trustee and cestui que trust, to that of guardian and ward, and pre-eminently to that of a solicitor and his client, who is necessarily so much under the influence of his solicitor. A solicitor to whom such a gift is offered ought to know the rule on the subject; and, being of necessity in a position which renders him liable to so much suspicion, he ought to inform his client that he should not make such a gift without independent advice, and that the client should not carry out the matter through him as solicitor, but should go to another solicitor. If he chooses to act himself in the matter, I think there is an imperative rule that such a gift is invalid. In this case the gift was to the solicitor's wife, and not to the solicitor himself; but the decision of the Court of Exchequer in the case of Goddard v. Carlisle, 9 Price 169, which has never been disputed, lays it down that there is no difference for this purpose between a gift to a man's wife and one immediately to himself, if the gift to the wife be effected by undue influence on the part of the husband. The principle is that, while the confidential relation exists, it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption exists as much when the gift is made to the wife as when it is made to the solicitor himself.

I confess I do not take the same view of the evidence in this case as the Master of the Rolls. It appears that the plaintiff had given a previous intimation that, in consequence of work having been done for her gratuitously by the solicitor, she intended to leave these houses to his wife—that is to say, leave them by a will, which is a revocable instrument. All that such a statement would amount to is that her then present intention was to make that revocable instrument in favor of the solicitor's

wife. Having instructed him to make a will, she has an interview with him for the purpose of signing the will; and he then brings forward a deed, which she had given him no instructions to draw, disposing of those houses in favor of his wife. The plaintiff says that she asked why one document would not do, and that she never understood that the deed was not a revocable instrument. The solicitor himself was at the time of the trial in a state of mind that precluded him from being called as a witness; but there was the evidence of another person who was present when the deed was executed. He was not a friend of the plaintiff, but merely happened to be present. He was called for the defendants. He did not say that the plaintiff was told that the deed would be irrevocable; all he said was that the deed was explained to her. If I had been the judge, I should have come to the conclusion that she never did know the difference in this respect between a deed and a will. I do not think it is to be presumed that this old lady had that knowledge, unless the matter was explained to her. All this took place when she went to sign a will; and I do not think it was clearly shown that she understood the effect of what she was doing. I do not, however, base my judgment on any such consideration. Assuming that she did know what she was doing, I think the rule of equity is that under the circumstances she must be presumed to have been acting under undue influence. I do not think that the learned judge below in determining this case paid sufficient regard to the rule of equity which I have mentioned, and which I must say commands my strongest respect and approval. For these reasons I think this appeal should be allowed.

Appeal allowed.

CHAPTER XIII.

ESTOPPEL—PENALTIES AND FORFEITURES—ELECTION—SATISFACTION.

Election.

KONVALINKA, EX'R, ETC., v. SCHLEGEL.

104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494. 1887.

ANDREWS, J. The question is whether the widow of the testator is put to her election between dower and the provision in the will. The estate of the testator consisted of both real and personal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bedroom furniture in his dwelling house, and to his children the rest of the furniture therein, proceeds as follows: "All the rest, residue, and remainder of my estate, property, and effects of every nature, kind, and description I give, devise, and bequeath to my executors and executrix hereinafter named, and I authorize and direct them to sell and dispose of the same at such time, and on such terms, as to them shall seem best, and to divide the proceeds thereof equally among my wife and children, share and share alike." There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife except by express words, or by necessary implication. Where there are no express words, there must be, upon the face of the will, a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions, and disturb the scheme of the testator as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because

she is devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement; or even because it may be inferred or believed, in view of all the circumstances, that, if the attention of the testator had been drawn to the subject, he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility arising on the face of the will between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this state showing the general principle, and the wide range of application. Adsit v. Adsit, 2 Johns. Ch. 452; Sanford v. Jackson, 10 Paige, 266; Church v. Bull, 2 Denio, 430; Lewis v. Smith, 9 N. Y. 502; Fuller v. Yates, 8 Paige, 325; Havens v. Havens, 1 Sandf. Ch. 331; Wood v. Wood, 5 Paige, 599.

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds, and the lands descended to the heirs of the testator subject to the execution of the power. 1 Rev. St. p. 729, § 56; Cooke v. Platt, 98 N. Y. 35.

It is strenuously urged that, the power of sale being peremptory, it worked an equitable conversion of the land into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust it is alleged is inconsistent with a claim of dower. The doctrine of equitable conversion, as the phrase implies, is a fiction of equity, which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property, as between real and personal representatives; and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees, in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. Vernon

v. Vernon, 53 N. Y. 351. But the mere creation of a trust for the sale of real property, and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person paramount to that of the trustee.

In the cases of Savage v. Burnham, 17 N. Y. 577, and Tobias v. Ketchum, 32 N. Y. 327, the widow was put to her election, not because the vesting of the title in trustees was per se inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case which, disconnected from the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed which is mainly to be looked to, because a correct principle is sometimes misapplied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration.

It has frequently been declared that powers of or in trust for sale are not inconsistent with the widow's right of dower. Gibson v. Gibson, 17 Eng. Law & Eq. 349; Bending v. Bending, 3 Kay & J. 257; Adsit v. Adsit, supra; In re Frazer, 92 N. Y. 239. And it was held in Wood v. Wood, 5 Paige, 596, that the widow was not put to her election, where the testator devised all his property to trustees, with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached, under very similar circumstances, in Fuller v. Yates, 8 Paige, 325; and in re Frazer, supra, the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory.

The general doctrine is very clearly stated by the vice-chancellor in Ellis v. Lewis, 3 Hare, 310: "I take the law to be clearly settled at this day that a devise of lands eo nomine upon trusts for sale, or a devise of lands eo nomine to a devisee beneficially, does not, per se, express an intention to devise the lands otherwise than subject to its legal incidents, dower included." This remark of the vice-chancellor also answers the claim that the

testator, when he described as the subject of the dower "all the rest, residue, and remainder of my estate," meant the entire title, or the estate as enjoyed by him. A similar argument was answered by Lord Thurlow in Foster v. Cook, 3 Brown Ch. 347. "Because," he said, "the testator gives all his property to the trustees, I am to gather, from his having given all he has, that he has given that which he has not."

The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were by the will to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him, and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation, which has been settled.

The judgment should therefore be affirmed.

(All concur.)

CHAPTER XIV.

NOTICE—BONA FIDE PURCHASE—PRIORITIES.

Constructive Notice by Possession.

THOMAS ET AL. v. BURNETT.

128 Ill. 37, 21 N. E. 352. 1889.

SHOPE, J. This was a bill filed by Martha J. Burnett against Charles W. Thomas and the sheriff of Randolph county, to set aside a certificate of purchase held by Thomas upon a 40-acre tract of land owned by the complainant, as a cloud on her title, and to enjoin the sheriff from making a deed under such certificate. Both parties claimed title under James Burnett, a son of the complainant. It is conceded that on the 29th day of March, 1882, James Burnett was the owner of the tract of land in controversy, which was inclosed and in cultivation, but upon which there was no house. On that day the complainant, as it is shown, bought the land in good faith from her son for the sum of $1,600. No deed was made until in the month of April following, when James Burnett conveyed the land to complainant. No question arises in respect to the payment of the purchase money at the date of the purchase. The land had been fenced, and under cultivation for over 20 years. David C. Thompson had for some years acted as the agent of James Burnett, while he was owner, and had rented the land from year to year. The deed to complainant was not recorded until October 22, 1884, and the land stood on the assessment books in the name of James Burnett, until 1885. The complainant, after her purchase, retained Thompson, as her agent in respect of this land, who, in August, 1882, rented the land as the complainant's to one Jordan for one year, who raised a crop thereon, and retained possession of the same until in August, 1883, when he surrendered possession to Thompson. In March, 1884, the agent rented the lands to Yagle. At each renting the agent informed the tenants that complainant was the owner of the premises, and that he was renting it for

her. A crop was raised on the land each year after 1882 by the tenants of complainant, and the fences were kept in repair by her agent, who collected the rent, and paid the same to her. On the 10th day of October, 1883, Margaret Gilfillen sued out an attachment against James Burnett in the Randolph Circuit Court, returnable to the March term thereof, then following, and this land was levied upon on that day as the property of James Burnett, and a certificate of levy duly filed. At the September term, 1884, of said court, said plaintiff in attachment recovered judgment for $2,500 against said Burnett. Special execution was issued thereon, under which, on October 22, 1884, the tract in controversy was sold to defendant Thomas, attorney of the plaintiff in question, for $1,900, and the sheriff delivered to Thomas a certificate of purchase, which is the certificate now sought to be set aside.

Section 31 of the Conveyance Act declares that all deeds, etc., authorized by law to be recorded, "shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record." An attaching creditor, who levies his attachment without notice of a prior unrecorded deed of his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale, and deed, will hold the legal estate as against the grantee in a prior unrecorded deed. Having acquired a lien as an innocent creditor without notice, he will have a right to enforce the same, notwithstanding he may have, subsequently to the levying of his attachment, received notice of the deed. Martin v. Dryden, 1 Gilman, 187; Stribling v. Ross, 16 Ill. 122; Jones v. Jones, Id. 117; Henderson v. Downing, 24 Miss. 106. Unless, therefore, the plaintiff in attachment had notice, either actual or constructive, of the unrecorded deed from James Burnett to Mrs. Burnett, the lien thereby acquired must prevail over the rights of the complainant under that deed. The statute makes her deed void as against the attaching creditor if a lien on the property was thereby secured in good faith, and without notice of her rights. Complainant's right to the relief sought depends, therefore, upon the fact whether the plaintiff in attachment, at the

time of the levy of the writ, had notice of her rights. There is no pretense that she had actual notice of the unrecorded deed, but it is claimed that she had constructive notice, arising from the possession of the land by complainant. Complainant took possession after her purchase by her agent and tenants, as we have seen, long prior to the levy of the attachment, and which possession she has ever since retained. It is well settled that actual possession of land by a party under an unrecorded deed is constructive notice of the legal and equitable right of the party in possession. The possession by tenant is the same in all respects as if by the party himself. Franz v. Orton, 75 Ill. 100; Whitaker v. Miller, 83 Ill. 381; Coari v. Olsen, 91 Ill. 273. It is claimed by plaintiff in error that possession, to have the effect of notice, must be of that character which will arrest attention, and the case of Loughridge v. Bowland, 52 Miss. 546, is referred to as sustaining that position. In that case the grantor of the land at the time of the conveyance was in possession of the same by his tenant. After the sale the same tenant continued to hold possession under an agreement to pay rent to the grantees. There was then nothing more than a technical attornment by the tenant to the purchaser. And the court held that the mere attornment of the tenant, without any visible change in the character of the holding, was not sufficient to put a creditor or subsequent purchaser on inquiry. It is not necessary to the decision of this case to express any opinion in respect of the doctrine there announced, for the reason that after the complainant's purchase she through her agent made a lease of the property to Jordan. This was in August, 1882, and for one year, and under it a crop was raised. The tenant was informed that his landlord was Mrs. Burnett, the complainant. The agent, as before stated, kept the place in repair as her agent, collected the rents, and paid them to her. Here were open, notorious acts of ownership asserted in an unequivocal manner by the complainant. Thompson, the agent, was not himself in possession of the property, but the tenants of complainant were, and it was their possession which constituted notice. It is, however, said that there was no tenant in actual possession at the time of the levy of the attachment, and therefore the plaintiff in error was not chargeable with notice of the unrecorded deed. The tenant's possession of land is that of his landlord. The Jordans

occupied the land up to August, 1883, and this was notice to the world of Mrs. Burnett's title, to all intents as if she had occupied it. Actual residence is not essential to continuous possession. If the party is in actual possession of the land, and there are continuous acts of ownership, it is sufficient. Coleman v. Billings, 89 Ill. 183; Ford v. Marcall, 107 Ill. 136. The land here in controversy was improved, and under fence. In such case, the owner will not lose his possession by failing to be continuously in the actual occupancy or use of the land by himself or tenant. The fact that a short time may have elapsed between the actual occupancy by one tenant, before another tenant takes possession, will not be a loss of possession by the owner. The improvements, the fact that a crop had been raised the previous season, will clearly indicate the possession, and will be sufficient to put others dealing with the property upon inquiry. The attachment here was levied October 10, 1883, a short time after the tenants had surrendered possession to Thompson, complainant's agent, who still continued to act as such agent in taking care of the property, and the plaintiff should have made inquiry before levying her writ of attachment. It is apparent this could have been done, either of the outgoing tenants or of the agent. Any reasonable, prudent man, contemplating a purchase of the property, would have made such inquiry; and it is clear that an inquiry of the Jordans or of Thompson would have led to notice of the claim of complainant, and of the existence of the unrecorded deed. We think the circumstances are such as to charge the attaching creditor with notice of the deed from James Burnett to the complainant. This being so, the Circuit Court committed no error in granting the relief prayed, and its decree will be affirmed.

Notice by Recording.

FROST v. BEEKMAN.

1 Johns. Chan. 288 (N. Y.). 1814.

THE CHANCELLOR (KENT). * * * Another and a more interesting question is respecting the extent and effect of the registry of the defendant's mortgage, as notice to purchasers. It was a mortgage for $3,000, and, by mistake, the registry was only for $300. This mistake is the whole cause of the controversy.

The Mortgage Act of the sess. 24 ch. 156, declared, among other things, that the registry of a mortgage should contain, not, indeed, the mortgage at large, but the essential parts of the mortgage, and among other specified parts, "the mortgage money, and the time, or times, when payable." To this register all persons whomsoever, at proper seasons, are at liberty to have recourse; and the act declared that mortgages were to have preference, as to each other, according to the times of registry, and that "no mortgage should defeat or prejudice the title of any bona fide purchaser, unless the same should have been duly registered, as aforesaid." This registry is notice of the mortgage, to all subsequent purchasers and mortgagees; and so the act was construed, and the law declared, by the Court of Errors, in the case of Johnson v. Stagg, 2 Johns. Rep. 510. The English authorities on this point do not, therefore, govern the case. The language of those authorities, undoubtedly, is, that the registry is not notice, though that doctrine is much questioned, and the point seems still to be floating and unsettled. Bedford v. Backhouse, 3 Eq. Cas. Abr. 615, pl. 12; Wrightson v. Hudson, Ib. 609, pl. 7; Morecock v. Dickins, Amb. 678; Latouche v. Dunsany, 1 Schoale & Lefroy, 157. Sugden, 3d Lond. ed., 524-7. Com. Dig., tit. 32 Deed, ch. 21, s. 11. The only question with us is, when, and to what extent, is the registry notice? Is it notice of a mortgage unduly registered? or is it notice beyond the contents of the registry?

The true construction of the act appears to be, that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the bona fide purchaser. The act, in providing that all persons might have recourse to the registry, intended that as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his

purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser, of the existence of a lease, is notice of its contents. Taylor v. Stibbert, 2 Ves. jun. 437; Hiern v. Mill, 13 Ves. jun. 118, 120; Hall v. Smith, 14 Ves. jun. 426. In that case, the party is put upon inquiry, and he must make it, or abide the consequences. The decision, in Jackson v. Neely, 10 Johns. Rep. 374, was made upon the same principle; and it was held that the recital in a deed of a letter of attorney, by which it was made, was notice to the purchaser of the existence of such a power. But here the statute did not mean to put the party upon further inquiry: The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety.

The question does not necessarily arise, in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof, or acknowledgment, would charge a purchaser with notice of the mortgage. The better opinion, in the books, seems to be, that it would not be notice, and that equity will not interfere in favor of an encumbrancer, when he has not seen that his mortgage was duly registered. Sugden's Law of vend. 527; 1 Schoale & Lefroy, 157; Hiester v. Fortner, 2 Binney, 40. But here everything was done that could have been previously required of the mortgagee. The mortgage was duly presented for registry, and he was not bound to inspect and correct the record. This was the exclusive business and duty of the clerk, and there is no reason why the registry should not operate as notice, to the amount of the sum mentioned therein; and, indeed, so far the obligation of the registry is admitted by the bill.

I conclude, therefore, that the registry was notice to purchasers, to the amount, and only to the amount, of the sum specified in the registry.

Effect of Notice.

PHILLIPS v. PHILLIPS.

4 DeGex, Fisher & Jones 208 (Eng.).

THE LORD CHANCELLOR (WESTBURY). When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the County of Monmouth, secured by powers of distress and entry. The annuity or rent-charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840.

The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee-simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement, dated in February, 1821, was executed, and under this deed the defendants claim; and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the statute of Elizabeth as against them in their character of purchasers for valuable consideration, and they also insist upon the Statute of Limitations. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was

available for the defendants, under these circumstances, and ought to be allowed as a bar to the claim by the Court. The Vice-Chancellor in his judgment refused to admit the defence of the purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz., that the doctrine of a Court of Equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this Court, and particularly in the case decided at the Rolls of The Attorney-General v. Wilkins, 17 Beav. 285.

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seized of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence, grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "Qui prior est tempore potior est jure." The first grantee is potior—that is, potentior. He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of Brace v. Duchess of Marlborough, 2 P. Wms. 491, and they are further

illustrated by the familiar doctrine of the Court as to tacking securities. It is well known that if there are three incumbrancers and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second. Now the defence of a purchaser for valuable consideration is the creature of a Court of Equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. Bassett v. Nosworthy, Finch, 102; S. C. Bassett v. Nosworthy, 2 White & T. L. C. 1, is if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar:

First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in Bassett v. Nosworthy, Finch, 102; S. C., 2 White & T. L. C. 1), or by a tenant for life for the delivery of title-deeds (which was the case of Wallwyn v. Lee, 9 Ves. 24), and the defendant pleads that he is a bona fide purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against a purchaser for valuable consideration without notice the Court gives no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law. Thus it was decided by Lord Thurlow, in Williams v. Lambe, 3 B. C. C. 264, that the defence could not be pleaded to a bill for dower; and by Sir J. Leach, in Collins v.

Archer, 1 R. & M. 284, that it was no answer to a bill for fines. In those cases the Court of Equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of Equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a Court of Equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the tabula in naufragio.

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.

Now these are three cases in which the defence in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the Court to one or to the other. But the subject of controversy, and the means of determining the right to that subject, are perfectly different. The argument, in fact, amounts to this: "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case therefore that I have to decide is, the ordinary case of a person claiming under an innocent equitable conveyance

that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of The Attorney-General v. Wilkins, 17 Beav. 285, but to the decision of that case, as explained by his Honor in the subsequent case of Colyer v. Finch, 19 Beav. 500, I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of Colyer v. Finch, 19 Beav. 500. It is impossible, therefore, to suppose that he intended to lay down anything in the case of The Attorney-General v. Wilkins, 17 Beav. 285, which is at variance with the ordinary rules of the Court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor the Vice-Chancellor is right upon the grounds on which he placed it in the Court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but inasmuch as the plaintiff sues in forma pauperis, of course it must be dismissed without costs.

CHAPTER XV.

MAXIMS OF EQUITY AND GENERAL PRINCIPLES OF JURISDICTION.

He Who Comes Into Equity Must Come With Clean Hands.

DERING v. EARL OF WINCHELSEA.

1 Cox Chancery 318 (Eng.).

Thomas Dering, Esq., having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the crown in the penalty of 4000*l.*, another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous in the same penalty of 4000*l.*, all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the crown to the amount of 3883*l.* 14*s.*, the crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed his bill against the Earl of Winchelsea and Sir John Rous, claiming from them contribution towards the sum so recovered against him.

The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

LORD CHIEF BARON (EYRE). This bill is brought by one surety against his two co-sureties, under the circumstances above mentioned. Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted. The demand is resisted on two grounds: 1st, that there is no foundation for the demand in the nature of the contract;

and, 2dly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection which I shall take notice of hereafter. I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this court under these circumstances: he might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the court, that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the court can take cognizance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to Sir Edward Dering in this case.

Equity Looks on That As Done Which Ought To Be Done.

SOURWINE ET AL. v. SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD.

12 Ind. App. 447, 40 N. E. 646; 54 Am. St. Rep. 532. 1894.

GAVIN, J. The correctness of the trial court's action in sustaining the demurrer to appellants' complaint is brought in review before us. The appellants are the beneficiaries of one Jonathan Croasdale, who in 1877 was admitted as a member of the appellee's endowment rank; entering classes 1 and 2, which entitled him to $1,000 and $2,000, respectively. At that time all members paid at the same rate. In 1884 the constitution of the order was so amended as to establish a fourth class, in which the amounts to be paid were graduated according to age. Provision was then made for transfer from the original classes to this class up to May, 1885; the time being afterwards extended to October, 1885. Croasdale, being an old man, declined to transfer, because of the heavier assessments, as he had a right to do. In 1888 the constitution was again amended, permitting transfers from the old divisions. By the constitution then in force (§ 1, art. 3), "an applicant for admission to membership in the endowment rank must be a Knight of Pythias in good standing, not over 50 years of age, be recommended by some competent practicing physician appointed by the board of control of the endowment rank, and be examined in accordance with the published rules for medical examiners on the form provided by said board of control, which must be approved by the medical examiner in chief, and the necessary fee paid, before he can take the obligation admitting him to membership." It was further provided that: "All present members of the first, second, and third classes of the endowment rank, in good standing in the rank, may be admitted to the fourth class by complying with the requirements of § 1 of this article, and the surrender of the endowment certificate or certificates held in said first, second, or third classes. In these cases the limitation as to age shall not apply." In March, 1889, said Croasdale, being then a member in good standing of the first and second classes in said endowment rank, asked to be transferred to the fourth class. He was duly examined, in accordance with the published rules for

medical examiners, on the form provided by appellee's board of control, by a competent practicing physician, regularly appointed by appellee. By said examination it was ascertained that said Croasdale was in perfect mental and physical health and condition, and he was unconditionally recommended by such physician. The application and medical examination, with the proper fees, were duly forwarded to the appellee's medical examiner in chief by Croasdale, who also offered to surrender his certificates; but on March 18, 1889, said examiner in chief arbitrarily, and without any valid and legitimate excuse or cause, disapproved said examination, and rejected the application peremptorily, because of his age, and for no other reason. On March 20, 1889, in response to an inquiry, he again declined to entertain it. On the same day the application was again renewed, and forwarded to the examiner, with the examination, as before, but it was again rejected as before. On January 30, 1891, the matter was laid before the supreme secretary and board of control, who again rejected the application, and approved the action of the medical examiner in chief; all being done arbitrarily, and without any justifiable, valid, and legitimate cause, although said Croasdale was in all respects possessed of all the requirements provided for, and had in all things complied with the laws, rules, and regulations entitling him to such transfer, and was then, and continued to the time of his death, ready and willing to pay all dues, fees, and assessments called for, and to comply with all of appellee's rules and regulations. On May 5, 1892, said Croasdale died. The first and second classes had then become so depleted that they paid but trifling sums to beneficiaries. Proper proofs were made, and appellants in this action seek to recover upon the ground that Croasdale was equitably a member of the fourth class.

Clearly, Croasdale possessed all the necessary qualifications, complied strictly with the requirements of appellee's constitution, and was in fact entitled to be, and, under the allegations of the pleadings, ought to have been, transferred. Appellee's position is that nevertheless he was not transferred in fact, and could not be without the approval of the medical examiner in chief, and for this reason his beneficiaries cannot recover. It is further contended that he had, by not asserting his legal right to the transfer, and not tendering the dues, acquiesced, and

abandoned his right to the transfer. The constitution and by-laws of such an organization are elements of the contract of insurance. They measure and determine the members' duties and liabilities, and not only these, but his rights as well. Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. 479. Not only the private members, but the officers, are under obligation to conform their conduct to them. Under the averments, the action of the medical examiner in chief, in rejecting the application solely by reason of Croasdale's age, was in direct violation of the constitution. Croasdale's fellows in the first and second classes had been permitted to transfer, and thus his classes had been depleted. In so doing they and the association only exercised their legal right, but the right to follow them was vested by the constitution in Croasdale. He was already a member of the rank, and this right of transfer was a contract right, and a beneficial one, of which the officers could not arbitrarily deprive him. Supreme Council v. Forsinger, 125 Ind. 52, 25 N. E. 129; Supreme Lodge v. Knight, supra. His position was, manifestly, radically different from that of one who was not a member of the organization, but was seeking admission into its ranks, as in the case of Matkin v. Supreme Lodge, 82 Tex. 301, 18 S. W. 306. The contractual rights and obligations were already existing between him and the association. Having done everything that was to be done by him to effectuate the transfer, and being in all things entitled to it, it did not rest in the discretion of the examiner to refuse him. Had the examiner refused him because he was not, in his judgment, possessed of the proper physical qualifications, it might well be that the examiner's action, in the absence of fraud or mistake, at least, would be final and conclusive against him, but no such question is here presented. On the contrary, the disapproval is arbitrarily, and without cause, solely by reason of his age, which, by the express letter of the society's law, is not a reason for rejection. Here is a manifest wrong. Yet it is asserted that, although there was a wrong, there is now no remedy. To so hold would be, to use a favorite phrase of Judge Elliott's, a reproach to the law. The arm of the law has not been so shortened as to leave the appellants remediless. If the application of the stricter rules of law, as formerly administered, do not furnish the remedy, the more expansive and beneficent principles of equity are ample for the

purpose. An eminent law writer speaks thus: "Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application. The court of equity has the power of devising its remedy, and shaping it so as to fit the changing circumstances of every case, and the complex relations of all the parties." 1 Pom. Eq. Jur. § 110. Again he says, at § 111: "It has therefore never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent, but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

While this case is one of a peculiar nature,—sui generis,—for which neither the counsel nor the court have found any direct precedent, the application of a familiar rule of equity furnishes, as it seems to me, a safe guide to its disposition. That this application ought to have been approved, and that the transfer ought to have been made, cannot be successfully controverted, nor are these propositions denied by appellee's counsel. They assert, however, that, while these things ought to have been done, they were not. Equity furnishes the remedy for just exactly that state of affairs, for the very first maxim with which we meet in equity is that it "will regard that as done which, in good conscience, ought to be done." This principle has been applied, says the same author, "to every instance where an equitable 'ought,' with respect to the subject-matter, rests upon one person towards another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party." 1 Pom. Eq. Jur. § 364. Vide, also, §§ 369 and 370. In Insurance Co. v. Jenks, 5 Ind. 96, it was objected that there could be no recovery because no policy had issued, but the court said, "Jenks having been entitled to a policy in his lifetime, a court of equity will consider that done which should have been done," and sustained a decree for a satisfaction. So, also, in

Wooddy v. Insurance Co., 31 Grat. 362, and Tayloe v. Insurance Co., 9 How. 390, where insurance contracts were to be issued, but had not, it was held that equity would enforce payment of the losses directly, without there having been a previous decree for specific performance. So equity will grant relief here, although Croasdale never, in his lifetime, compelled the transfer by mandate, as he might have done. We do not think it lies in appellee's mouth to complain that some hardship may be imposed on it by reason of his failure to compel the transfer. For whatever hardship may arise therefrom, appellee, and not he, is responsible.

Neither do we think that appellee is in a position to take any advantage from the plea that, by allowing this action, appellants are permitted to reap the benefits of Croasdale's membership without his having borne the burdens. That he did not bear these burdens during the 15 months after the final rejection of his application for transfer, was due entirely to the wrongful conduct of appellee, and can in no degree be ascribed to any delinquency upon his part. Whatever unpleasant results may follow from appellee's own misconduct should be borne by appellee, and cannot be shifted to others, who are wholly innocent. It is a well-known maxim that parties are not to be permitted to take advantage of their own wrong. In Jackson v. Association, 78 Wis. 463, 47 N. W. 733, we find a case closely analogous to the one under consideration. The membership of the deceased had there been declared forfeited, but there was, under the by-laws, a right to reinstatement on certain terms, among which was furnishing a satisfactory certificate of health. The member took the necessary steps, and mailed the application and money, with a proper certificate of health, but died before these were received at the office of the association, which thereupon, after notice of her death, rejected the application for reinstatement. It is said by the supreme court, per Orton, J.: "The court instructed the jury on that subject, as follows: 'That Mrs. Jackson was dead before the reinstatement and money reached Madison, if you find such to be the fact, was good cause for the disapproval of her application.' This instruction was also erroneous. If Mrs. Jackson mailed the papers and money in proper time, according to the by-laws or the custom of the company, her rights became fixed by it, and her subsequent death before the package

reached the company could not change them. She had done all that the company required of her by the notice of reinstatement." Again it is said: "The court erred, also, by instructing the jury that the company had the right to reject her application for reinstatement 'upon the ground that it did not consider her statements in regard to health sufficient.' If Mrs. Jackson secured any right whatever by so responding to this last reinstatement notice of the company, then the certificate of health she sent with the other papers and the money did not depend upon how the company considered it, but upon its sufficiency in fact." Thus it is held that one may be by the courts regarded as entitled to the rights of membership, although not recognized as such by the officers. By deducting from the sums due appellants the amount of dues which would have been collectible from Croasdale in the fourth class, appellee will be in the same position it would have occupied had it complied with the requirements of its own laws, and made the desired transfer. Appellee's laws are, as we have said, made for the government of its officers as well as its members. Had the officers obeyed the law, as Croasdale did, all controversy would have been avoided. After Croasdale had so fully complied with appellee's rules, we do not think he can be deemed to have acquiesced in its officers' wrongful conduct, and to have abandoned his legal and equitable rights, merely because he did not commence a mandate, or make a formal tender of fourth-class dues, which would have been useless, in the face of appellee's continued refusal to make the transfer, which was equivalent to an announcement that it would not receive dues from him in that class. Our conclusion, therefore, is that the trial court erred in sustaining the demurrer to the complaint. Judgment reversed.

REINHARD, J., did not participate.

LEADING ILLUSTRATIVE CASES LAW OF TRUSTS

CHAPTER II.

TRUSTS DISTINGUISHED FROM OTHER RELATIONSHIPS.

Trust Distinguished from a Debt.

PEOPLE v. CITY BANK OF ROCHESTER.

93 N. Y. 582. 1883.

Appeal from order denying motion to direct the receiver of the City Bank to pay to the petitioner certain moneys, the avails of collections.

RAPALLO, J. The petitioner and the City Bank of Rochester acted as collecting agents for each other in the cities where they were respectively located. The petition in this matter avers on information and belief that the petitioner had, prior to the failure of the City Bank of Rochester, sent to that bank commercial paper for collection; that the paper had been collected, and that the bank had placed the amount so collected on its books as a fund belonging to the petitioner, separate and apart from other funds of the bank, and that the fund so set apart remained in the bank at the time of the appointment of the receiver. These averments are controverted by the affidavits read in opposition to the motion, which show that the course of dealing and arrangement were that each of the two banks kept a running account with the other, crediting it with the avails of collections made for it, and charging it with papers sent to it for collection; that a balance was struck once a week, and the bank found indebted to the other remitted to it by draft on New York the balance due, less commissions, and that the avails of these collections were never kept separate from the other funds of the bank or distinguished therefrom in any way. Upon this state of facts the

creditor bank failed to establish any lien, or impress any trust on any specific money of the debtor bank, which would enable it to follow any of its property or funds which went into the hands of the receiver and obtain payment in preference to other creditors. Each sum collected, as it came in, became the property of the collecting bank, who simply became liable to account for it to the other on the next settling day. It was under no obligation to pay over each specific sum received. Whether there would be anything to pay over, depended upon the condition in which the account should be when the settling day arrived. This was the course of dealing agreed upon and followed between the parties for a long period, and it established between them the relation of debtor and creditor in respect to these collections.

Order affirmed.

PEOPLE v. BANK OF DANSVILLE.

39 Hun 187 (N. Y.). 1886.

Appeal from an order requiring the receiver of the Bank of Dansville to pay $226.02 to the petitioner, Enger & Co., in preference to the general creditors of the bank.

BARKER, J. The firm of George Enger & Co., doing business in Cincinnati, were creditors of one Hampton, who resided in the village of Dansville in this State, where the Bank of Dansville was located, and they on the 15th of March, 1884, drew their sight draft on him for the sum of $213.75, payable to the order of Luther Grant, the cashier of the bank. The drawers sent the same to the bank for collection with specific instructions to remit the proceeds. On the 15th of April, 1884, the draft was paid in full to the bank. On the next day the bank drew its own sight draft for the amount of the collection less charges, on the Seventh Ward National Bank, New York, payable to the order of George Enger & Co., and forwarded the same to them which they immediately on its receipt forwarded for collection and the same was returned dishonored. The bank of Dansville was at this time insolvent and closed its doors and ceased to do business within a day or two thereafter, and the appellant was in a judicial proceeding appointed receiver. The claimants had no prior dealings with the bank.

The instructions given by the drawer of the draft constituted

the bank their collecting agent and no other relation than that ever existed between them. Montgomery County Bank v. Albany City Bank, 7 N. Y. 459. The title to the moneys collected by the bank in payment of the draft was in the drawers, as much so as was the obligation which they held against Hampton. When the latter paid over to the bank the amount of his debt, it became the bailee or trustee of the fund, but in no sense the owner. Nothing can be gathered from the letter of instructions indicating that it was the intention of the drawers that the bank should become their debtor for the avails of the draft, or that the title to the money should pass to them for any purpose. On the contrary the instructions were most specific that the proceeds should be remitted to them immediately. The particular mode of making the remittance was not mentioned, so the bank, under the general authorization contained in the letter of instructions, could adopt any of the usual and customary modes of remittance in use by banks or business men at that place. It could have purchased a draft of some third party, on some bank or banker, in the usual course of business, and if it had used the money for that purpose, and in good faith, it would have been an act within the limits of its agency. But it was not authorized to use the funds and send its own draft on its own correspondent as a means of payment. It could not in that way discharge the duties it owed to its principal. Until its own draft was paid, the transaction would not amount to a remittance. The relation which the parties held towards each other, and the duty which the bank assumed on receipt of the draft for collection, rests on principles of law so elementary that an attempt at illustration seems superfluous. It may be said, however, that when a bank consents to act as a collecting agent it assumes precisely the same duties and obligations towards its principal as an individual does when he acts in the same capacity. This case is readily distinguishable from the case of The People v. The Merchants and Mechanics Bank, 78 N. Y. 269, cited by the learned counsel for the receiver. The facts are dissimilar and nowise the same in effect. In that case the depositor with the bank became its creditor in the usual course of business, and drew out the deposits on its own checks, at its convenience, with a view of paying its obligations to third parties. The circumstances were such that the court held that the bank became a

debtor to the depositor. Thereafter the depositor drew its own check on the bank in favor of a third party, who, on receipt of the same, sent it forward for payment. The bank on receipt of the check charged the amount to the drawer's account and surrendered up the check to the drawer and then forwarded its own draft to the payee of the check as the mode of making the remittance. The draft was never paid, and the bank being insolvent a receiver was appointed of its assets, and it was held, as the check was sent forward for payment and not for collection, and as the bank had not received, in any sense, money on the check for the payee of the draft, and as no fund had been set apart and appropriated by the bank for the payment of the check, so as to constitute a trust fund, that by the transaction the payee of the check became pro tanto a creditor of the bank in place of the original depositor.

The general rule, as established by the authorities on the subject, may be stated as follows: Where one person receives into his hands the funds of another, he is deemed to hold them in a fiduciary capacity, such as bailee or trustee, unless they were so received with the understanding, express or implied, that the same should be turned into a debt. Libby v. Hopkins, 104 U. S. 307; Rose v. Hart, 8 Taunt. 499; People v. City Bank of Rochester, 96 N. Y. 32. The receiver of the bank as its representative, received its assets subject to the same equities and impressed with the same trust under which they were held by it. In re Howe, 1 Paige 125; Le Roy v. Globe Ins. Co., 2 Edw. 657; In re Le Blanc, 14 Hun 8; People v. City Bank of Rochester, 96 N. Y. 32. If the identical moneys collected by the bank did not pass into the hands of the receiver, it makes no difference, for in some shape or form they went to swell the assets which fell into his hands.

In Cook v. Tullis, 18 Wall. 332, the rule is laid down as follows: "It is a rule of equity jurisprudence, perfectly well settled and of universal application, that where property held upon any trust to keep or use, or invest in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or cestui que trust."

As the funds in the hands of the receiver were custodia legis, it was unnecessary for the petitioners to file a bill for the purpose of establishing their equity, and their claim was properly directed to be paid on a summary application by petition. In re Le Blanc, 14 Hun 8. As none of the facts set forth in the petition were denied by the receiver in his reply thereto, a reference was wholly unnecessary, and besides it does not appear that any was demanded on the hearing at Special Term.

The order appealed from is affirmed, with costs and disbursements to be paid out of the funds in the hands of the receiver.

Trust Distinguished from Bailment.

ASHLEY'S ADM'RS v. DENTON.

1 Littell 86 (Ky.). 1822.

BY THE COURT. Thomas Denton and wife exhibited this bill in chancery against the administrators of Thomas Ashley, deceased, charging, that said decedent was the son of the female complainant, by a former husband; that during her widowhood, she became possessed of sundry slaves, which passed to her from the estate of a deceased relative in North Carolina, where she resided, and that she removed with them to Kentucky, in some of the upper counties; that she entrusted the negroes aforesaid with her said son, for the purpose of his going in search of a suitable residence for her, and there making preparations for her family, and then he was to return and move her to it; that the son took possession of the slaves, for the purposes aforesaid, and, to her astonishment, did not return, nor was he heard of for several years, and was then discovered, by a person employed for the purpose of searching for him, to be living, with the slaves aforesaid, in the state of Tennessee. Some time after his discovery, he removed to the now county of Butler, in this State, where he resided until his death, in 1817. That, after his return to Kentucky, he refused to surrender them, when demanded; that they were increased, and are in the possession of said administrators and heirs. They allege that they are fully able to substantiate said facts by proof, and pray that the restoration of the slaves may be decreed, with payment of the hire. * * *

It is now contended, that the chancellor had no jurisdiction

of the case, and that the remedy of the appellee is properly at law. On the other side, it is insisted, that the claim of the appellants is founded on a trust, and that the son took and held the slaves for the use of his mother, and therefore the chancellor properly entertained jurisdiction of the case.

It is true, that uses and trusts are a favored part of the jurisdiction of the chancellor, and frequently, he will, on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or, in other words, placed a confidence, which has been abused. If so, every case of bailment, and every instance of placing chattels, by loans or hire, would be swallowed up by courts of equity. Nay, every case where credit was given for debt or duty, would soon be drawn into the same vortex. It ought, then, to be confined to cases of controlling legal rights, vested and remaining in trustees, created as such in some proper mode, and not to be extended to all cases of abused confidence. If the case, therefore, of the appellee, is to be tested by the original bill alone, we have no doubt, it makes out no case for the interposition of the chancellor; that placing the slaves in the possession of her son, for the purpose of preparing and improving her a a home, and his right then to cease, was not such a trust as would sustain the bill, and that she had a plain and adequate remedy at law. * * *

Trust Distinguished from Executorship.

DRAKE v. PRICE.

5 N. Y. 430. 1851.

Action to recover moneys withheld by executors and claimed as commissions for services rendered as trustees.

FOOT, J., delivered the opinion of the court.

The material question in this cause is, whether the appellant and his deceased co-executor held the funds as executors or as trustees, or in other words, whether, as executors, they had paid it over to themselves, as trustees, and held it in the latter character.

The same question arose, on a similar clause in a will in the case of Valentine v. Valentine, 2 Barb. Ch. R. 430, and Chancellor Walworth decided, that the executors held the funds in their character as executors and not as trustees. His decision appears to me to be sound, and in accordance with the provisions of the will.

Holding the fund, and receiving and paying over the interest, as executors, the appellant and his co-executors are clearly entitled to only one per cent on the interest received and paid.

PAIGE, J. (dissenting). The office of an executor is, to take possession of all the goods and chattels, and other assets of the testator; to collect the outstanding debts and sell the goods and chattels so far as is necessary to the payment of the debts and legacies; to pay the debts and legacies, and under the order of the surrogate to distribute the surplus to the widow and children, or next of kin of the deceased. These acts embrace all the duties which appropriately belong to the executorial office. If any other duty is imposed upon the executor, or any power conferred, not appertaining to the duties above enumerated, a trust, or trust power is created, and the executor becomes a trustee, or the donee of a trust power. And such powers are conferred, and such duties imposed upon him, not as incidents to his office of executor, but as belonging to an entirely distinct character—that of trustee. And in all such cases the trust and executorship are distinguishable and separate. The allegations of the complaint make out a case of trust. The defendants who were executors, were directed in the will of Gilbert Hunter to invest $5,000, as the share of the plaintiff, Julia Drake, and to keep the same invested during her life, and to secure the interest and pay the same over annually to her during her life, and on her decease, to divide the principal among her lawful heirs. The defendants in accordance with the direction of the will, invested the $5,000, and have annually paid over to her the interest, deducting therefrom five per cent commissions. This is not like the case of Valentine v. Valentine, 2 Barb. Ch. R. 430. In that case the trust had not been assumed by the executors by an investment of the trust monies, and the consequent separation from the monies held by the defendants in their character of executors. Here the separation was made. The share of the plaintiff, Julia

Drake, was taken out of the mass of the monies belonging to the estate of the testator, and invested as a separate trust fund for the use and benefit of the cestui que trust. The payment of the interest annually on the sum so invested to the plaintiff, Julia Drake, is equivalent to an annual accounting under the 154th rule of the late court of chancery and entitled the defendants to full commissions on the sum so received, as interest, and paid over each year, without regard to the aggregate amount of the previous receipts and disbursements by them, either as executors or trustees. (6 Paige 216; 7 Paige 266; 2 Paige 287; 9 Paige 467.) The question whether the defendants would be entitled to double commissions for receiving and paying out the principal sum of $5,000, does not arise in this case. There was no actual payment to the defendants of the $5,000 as trustees; the money being already in their hands as executors. And there will be no actual payment out, of the $5,000, until the death of Julia Drake.

The Revised Statutes allow executors full commissions, only when monies are both received and paid out. And under the late chancellor's decision, one half commissions are to be allowed for receiving and one half for paying out (7 Paige 267). No commissions can be allowed, on either the investment, or the reinvestment of trust monies, or on the collection of monies so invested or reinvested (7 Paige 265).

I am of the opinion that the judgment of the supreme court should be reversed.

Judgment affirmed.

Trust Distinguished from Guardianship.

ROLLINS v. MARSH.

128 Mass. 116. 1880.

Action against guardian on a promise to pay for the care of his ward.

SOULE, J. Guardians of minors, spendthrifts, or insane persons do not become owners of the property which is placed under their charge. The title thereto remains in the wards. The guardians have only a naked power, not coupled with an

interest. The debts of the ward remain his debts, and can be recovered by suit against him, not by suit against the guardian. Brown v. Chase, 4 Mass. 436. Simmons v. Almy, 100 Mass. 239. Such suit may be defended by the guardian in behalf of the ward. The guardian cannot bind the person or estate of his ward by contract made by himself. Such contract binds him personally, and recovery for breach of it must be had in an action against him. Micks v. Chapman, 10 Allen 463. Bicknell v. Bicknell, 111 Mass. 265. Wallis v. Bardwell, 126 Mass. 366. He cannot escape liability on such contracts by reciting that he makes them in his official capacity; and it is immaterial, in a suit brought against him thereon, whether he is described by his official title or not. The judgment in either case must be against him personally, and the description has no legal effect. It may be disregarded as surplusage. It is immaterial, therefore, that the cause of action is described in one count as a contract made by the defendant, and in another as a contract made by the defendant in his official capacity. The legal liability being the same in whichever form the contract is made, there is no inconsistency in the counts. * * *

CHAPTER III.

THE CREATION OF EXPRESS TRUSTS.

Precatory Expressions.

PHILLIPS v. PHILLIPS.

112 N. Y. 197, 19 N. E. 411. 1889.

Action by Mary B. Phillips, as executrix of the last will and testament of Lewis S. Phillips, deceased, against Edwin W. Phillips, to construe said will. Defendant appeals from a judgment of the general term, affirming a judgment theretofore entered on the decision of Williams, J., after a trial at special term. Defendant having died since said judgment, his executors, Albert C. Phillips and Frederick A. Lyman, are substituted.

FINCH, J. The will to be construed was written by the testator himself, and, while extremely brief and simple, presents a problem not altogether easy of solution.

Its terms give to the testator's wife the whole of his property, real and personal, name her as executrix, and then proceed as follows: "If she find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year, and also to give my brother Edwin W. during his life the interest on ten thousand dollars, (or seven hundred dollars per year,) I wish it to be done." The widow has paid the annuity to the sister regularly, but that to the brother for a single year only. During the years succeeding no payment was made, and this action is brought by the executrix for a construction of the will and to determine whether she is bound to make the payments withheld. It is admitted by formal stipulation that the contingency described in the will has in fact happened during the three years after 1883, and that the financial situation of the widow during the years of her refusal was such that it was entirely convenient for her to have paid the disputed allowance, and that she refused payment, not on that account, but from motives of her own, with which she claims the courts have no concern, and about which they are not at liberty to inquire. The general term

has sustained her contention upon an opinion of the trial judge, very patiently and carefully prepared, and from which we depart only upon convictions that we are unable to resist.

The real intention of the testator was one of two things: He meant to make the annuities to his brother and sister dependent upon the existence of a specific fact, or upon the choice and will of his devisee. If they rest upon the former, they become a gift from him; if upon the latter, they have no existence outside of the choice of the widow. The substantial argument in her behalf is that a devise and bequest of the whole property, sufficient in its terms to carry the absolute ownership, will not be cut down by a later provision, unless that is clear and definite, and manifests such purpose and intention; that the words, "I wish it to be done," are not a direction or command, but the mere expression of a desire intended to influence, though not to control, the action of the wife in dealing with what is absolutely hers. The whole strength of this argument lies in the use of the word "wish" by the testator. It is claimed to be not sufficiently imperative or unequivocal to master the discretion involved in the absolute ownership previously given, and to rise only to the level of a request or suggestion. But the word "wish" used by a testator is often equivalent to a command. If in this will he had said, "I wish all my property to go to my wife," and, naming her as executrix, had ended his will, neither she nor we would have questioned that the devise was effectual. We gave that force to the word in a case involving other circumstances which left little room for doubt. Bliven v. Seymour, 88 N. Y. 469. It is true that in both the supposed and the decided case no other meaning could be given to the word "wish" than that of "will" or "direct," while here the narrow and less imperative interpretation is possible; but that fact only makes more difficult the duty of determining in which sense the word was employed in the will before us, and of ascertaining the purpose and intent of the testator. He left no children. His duty, as it is evident he understood it, was first and primarily to his wife, and next to his sister and brother. He left an estate worth $100,000, and knew that his wife possessed in her own right $40,000 more. The primary duty to his wife he met by giving to her all his property. The duty to those of his own blood he performed either by a bequest of the annuities to

them charged upon the gift to his wife so long as that charge should prove no inconvenience to her, or by leaving those annuities wholly to her discretion himself, merely seeking to influence, but not to control, her choice. And so we are to ascertain, if we can, which is the truth, or that there is such doubt as to make the general devise conclusive.

One suggestion made on behalf of the appellants is that the framing of the condition or contingency shows that the provision for the brother and sister was not meant to be dependent upon the absolute and uncontrolled choice of the wife. If that had been testator's purpose, the condition interposed was both needless and misleading. Without it she would be left to give the allowance or not as she pleased, and could suffer no inconvenience at the hands of the testator. But with it the inference is that the contingency provided for was the only one intended to excuse payment. That contingency was an actual fact, to happen or not to happen along the line of the future, and independent of the mere volition or choice of the general devise. "If she finds it always convenient" are the words. "If she finds it;" that is, if experience shows it; if the facts at the time of payment prove to be such; if her financial condition as it shall then exist enables her to pay easily. The expression contemplates, not her choice or preference, but her pecuniary situation after the experience or management of one or more years, and it indicates his purpose to have been to charge the annuities upon the sweeping gift to his wife, provided, and provided only, that in her experience of the future it should turn out that the payment of those charges would occasion her no inconvenience. "If she finds it always convenient;" that is, on each occasion,—at the date of every payment. The use of the word "always" implies a conviction in the testator's thought, which would quite naturally exist, that in view of the large estate he had given his wife, and her own ample fortune, it would usually and ordinarily, when the time of payment came, prove to be easy and convenient for her to spare the money for that purpose, but that such a state of facts might not always and upon every occasion exist; that in her management of the property there might come misfortune reducing or destroying income, or some exceptional increase of expenses due to an under-estimate of incurred expenditure, and, if that happened at any one or more of the

times of payment, he desired that not she, but his sister and brother, should bear the consequent inconvenience. In these words of the testator his purpose and intention, I think, is sufficiently disclosed. He did not mean to make the payment of the annuities dependent upon the mere choice or will of his wife, but upon her ability to pay them without inconvenience to herself. Given that ability, he says: "I wish it to be done." The words are not, "I wish her to do it," or "I hope she will feel it to be her duty," or "I trust she will see the propriety of such payment to be made;" but "I, the testator,—dealing with my own bounty to her,—I wish it to be done; it is my wish, not hers, that I put behind the annuities." It is observable, also, that in the gift to his wife he does not add words that could seem inconsistent with a subsequent charge upon it, as, "for her own use and benefit," "or to her and her heirs forever," but leaves the path to a trust or a charge unobstructed, so far as possible.

It is perfectly well settled that what are denominated "precatory words," expressive of a wish or desire, may, in given instances, create a trust or impose a charge. Without a detailed consideration of the cases, it is quite clear that, as a general rule, they turn upon one important and vital inquiry, and that is whether the alleged bequest is so definite, as to amount and subject-matter, as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. In the latter case there can neither be a trust nor a charge, while in the former there may be and will be, if such appears to have been the testamentary intention. The distinction is clearly drawn and was acted upon in Lawrence v. Cooke, 104 N. Y. 632, 11 N. E. Rep. 144. The word there used was "enjoin," in itself a more imperative word than "wish;" and yet a trust or charge was denied because by the terms of the command the payment to the granddaughter was placed wholly within the discretion of the residuary devisee, and could not be touched by the court without its utter destruction. The provision to be made was at such times, in such manner, and in such amounts as the devisee should judge to be expedient, and controlled only by what her own sense of justice and Christian duty should dictate. It was added that, if she had been enjoined to make

suitable provision out of the residuary estate, a charge would have been created; for what would be "suitable" could be determined as a fact, and would be independent and outside of the mere choice or whim of the devisee. If the word had been "wish" instead of "enjoin," the result could not have been different upon either branch of the conclusion. The doctrine is clearly and strongly stated in Warner v. Bates, 98 Mass. 277, and had an early illustration in Malim v. Keighley, 2 Ves. Jr. 532. I have examined the cases in our own court prior to Lawrence v. Cooke, and have found in none of them a departure from the doctrine there asserted, or a judgment in hostility to it. The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words "I wish" or "I desire" is by no means conclusive. They serve to raise the question, but not necessarily to decide it. We are convinced that in the present case the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided only that their payment should not occasion her inconvenience. The legacy to the brother should be computed at $700 per year.

The judgment should be reversed, and judgment rendered for the defendant construing the will in accordance with this opinion, with costs.

The Statute of Frauds.

BATES v. HURD.

65 Me. 180. 1876.

Bill in equity to declare a trust and for an account.

BARROWS, J. In 1847, one Kennedy gave to Nicholas Bates and his brother Thomas, the plaintiff, a bond conditioned for the conveyance of certain parcels of land (estimated at about two hundred and fifty acres), upon payment of the obligee's notes. In 1851, before the maturity of all the notes, an adjustment was made, by which, in satisfaction of the bond, he made conveyances of the bonded land in two separate parcels;—one to Wm. W.

Bates, a third brother, and the other to Nicholas, who (with Wm. W. and the plaintiff) subscribed and delivered to Kennedy a receipt indorsed upon the bond, setting forth that he had received the deed of his portion, "for himself and in trust for his brother Thomas Bates, according to what the said Thomas has or may pay towards the same real estate which amounts at present to seventy-five dollars." The price of the parcel thus conveyed to Nicholas was $450, and Nicholas seems to have admitted a resulting trust in favor of the plaintiff to the amount of one-sixth of the purchase, which was binding upon him and all claiming under him with notice.

Indeed the writing subscribed by Nicholas Bates seems to be tantamount to a declaration of an express trust, so as to satisfy R. S., c. 73, § 11.

The words "created and declared" in that statute seem to be construed by the courts to be synonymous with "manifested and proved" as they stood in the original seventh section of the statute of frauds, 29 Car. II, c. 3. Forster v. Hale, 3 Ves., jr., 707. S. C., 5 Ves. 308. Unitarian Society v. Woodbury, 14 Maine 281. Barrell v. Joy, 16 Mass. 221. Pinnock v. Clough, 17 Vt. 508.

From the cases just cited and numerous others we see that a letter, memorandum, or recital subscribed by the trustee, whether addressed to, or deposited with the cestui que trust or not, or whether intended when made to be evidence of the trust or not, will be sufficient to establish the trust when the subject, object and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty.

The existence of a trust in favor of the plaintiff, which he may enforce against Nicholas Bates and his representatives, and all claiming under him with notice of the trust, may be regarded as established. * * *

Savings Bank Trusts.

FARLEIGH v. CADMAN.

159 N. Y. 169, 53 N. E. 808. 1899.

Action by Cora Imogene Farleigh against Alfred J. Cadman and others to have $778 and interest deposited by Sarah Cadman in the name of William J. Cadman for the benefit of plaintiff

declared a trust, and to have other moneys added by William J. Cadman to the deposit declared a part of such trust fund in favor of plaintiff. There was a judgment declaring a trust in a part of such fund in favor of plaintiff, and both parties appealed to the appellate division. From a judgment affirming the same, plaintiff appeals. Reversed, and judgment ordered for plaintiff for the whole amount of the deposit as it stood at a certain date.

O'BRIEN, J. The plaintiff brought this action to recover certain moneys that came to the hands of the defendant, and which were claimed by the plaintiff as a trust fund created for her benefit. The facts are undisputed, and the controversy from the beginning involved questions of law only.

When the plaintiff was a child three or four weeks old, she was taken into the family of the defendant's father, William J. Cadman. Although never legally adopted, she was treated by him and his wife as their own child, and was cared for and educated in the same manner. The plaintiff supposed that they were her real parents until after she had grown to years of maturity, and when about 22 years of age she married without the consent of Mr. Cadman. Until this event the plaintiff and the defendant were considered and treated as the two children of the household, since there were no others to provide for. Prior to the 20th of April, 1878, Mrs. Cadman had some money in her own right, and at least a portion of it was on deposit in a savings bank to her credit. She and her husband arranged to set apart this money, or a portion of it, for the benefit of the plaintiff; and in pursuance of the arrangement the wife delivered her bank pass book to the husband, with the necessary order to enable him to draw the money, to the end that it might be deposited for the plaintiff's benefit in the same savings bank.

On the date last mentioned the husband took this pass book and the order to the South Brooklyn Savings Institution, and there opened an account in his own name "in trust for Cora I. Cadman," the plaintiff; that being the name she bore at all times prior to her marriage. The amount placed to the credit of this account on that day was $778, all of which was transferred from the account of Mrs. Cadman in the bank, and which was represented by the pass book and order which she had delivered to her husband.

The plaintiff, then about 12 years of age, had been informed of this arrangement for her benefit, and was present at the bank with her father (as she then supposed him to be) when the account was opened; so that she may be regarded, at least in some sense, as a party to the transaction. It is clear from the record that the purpose of this transaction was to make a provision for the plaintiff's benefit, and it took this form after consultation in the family and with the officers of the bank.

It cannot be doubted that a valid and irrevocable trust was thereby created for the plaintiff's benefit, within all the authorities on that subject. * * * In substance and legal effect, that was the finding of the learned trial court, which has been affirmed at the appellate division, and so far we are concluded by the decision.

But Cadman, the trustee, subsequently made various other deposits to the credit of this account, and drew out sums aggregating something over $200, which were used for the plaintiff's benefit. On the 7th day of January, 1889, about the time of the plaintiff's marriage,—which the trustee did not approve,—he drew out the whole sum standing to the credit of the trust account, which appears to have been $2,774.16, with perhaps some accumulated interest to be added, closed the account, and opened a new account in his own name in trust for his son, the defendant, Alfred J. Cadman. He continued to make deposits to the credit of this new account, in small sums, and to draw out small sums, up to the time of his death, on the 19th of September, 1892. The defendant was appointed the executor of his father's will, and on the 27th of September, 1892, he drew out all the money standing to the credit of his father in the new trust account, and deposited it in the same bank in a new account, in his individual name. In this way the defendant became possessed of the whole fund.

Both parties have appealed from the judgment,—the defendant, because the plaintiff was permitted to recover the amount of the original deposit of $778, and interest; and the plaintiff, because she was not permitted to recover the sums subsequently deposited to the credit of the trust account prior to the time it was closed by the trustee, on the 7th of January, 1889, and the proceeds transferred to the new account in trust for the defendant.

The order of the court below, made upon the appeal from the order of the trial court, states that it was unanimously decided that all the findings of fact are supported by evidence. This must dispose of the defendant's appeal, since it rests entirely upon the proposition that no valid trust was created by the transaction in favor of the plaintiff. A gift, whether in the form of a trust or otherwise, always involves the intention of the donor; and the courts below having found unanimously that there was a gift to the plaintiff, which took the form of a deposit in a savings bank in trust for her, the finding cannot be questioned here.

It follows that the defendant's appeal cannot be sustained. There is nothing in the case of Cunningham v. Davenport, supra, that conflicts in any respect with this conclusion. In that case it was held that the proof did not establish an intention on the part of the alleged donor to establish a trust for the benefit of the alleged beneficiary. But all the facts that were necessary to establish the trust which were absent in that case are notably present in this; and, moreover, the provision of the constitution and the statute which forbids this court to review the decision of the court below, when it is unanimously held that the findings of fact are supported by evidence, did not apply to that case, as it does to this.

We think that the findings of the trial court, unanimously affirmed on appeal, entitled the plaintiff to a judgment for the whole amount of the trust account as it stood before the change made by the trustee on the 7th day of January, 1889. The finding is that the original deposit was in the name of Cadman, as trustee for the plaintiff. The addition to the fund made by the trustee was impressed with the same character as the original deposit; and thus the whole amount so deposited, while the account stood in the original form, represented a credit in the bank to the trustee for the benefit of the plaintiff, and in trust for her. The subsequent deposits made to the credit of this account cannot be detached or separated from the original deposit by means of which the trust was created, in the absence of a finding that they were intended for some other purpose, or that they were not made for the plaintiff's benefit. These deposits were prima facie, at least, made for the same purpose as the first one, and hence in every case were additions to the original gift.

The learned trial court found that the trustee exercised control over these deposits up to the time of his death. This finding is entirely consistent with the existence of a trust as to the whole fund, and does not in the least detract from the plaintiff's claim that she was the beneficiary of all the money deposited in trust for her by her trustee. Her right to the subsequent deposits rests upon the same ground as her right to the first one. The purpose and intention attending the original transaction followed all the subsequent acts of the trustee in adding to the trust fund, and impressed the whole with the same character as a gift to this plaintiff, or for her benefit, in the form of a trust of personal property.

The control which the trustee exercised over the later deposits was not different from that which he exercised over the first one, since he drew the whole out at the same time, and attempted to create a new trust with the proceeds of the first one for the benefit of the defendant. But the right of the plaintiff having attached to the whole sum when, and as fast as, it was deposited, the trustee could not affect these rights without her consent. The trustee could not destroy a trust once established by attempting to divert the fund from the beneficiary to other purposes, and that is what he undertook to do when he changed the form of the original transaction, and substituted another beneficiary in the place of the plaintiff.

The fact that the trustee controlled the fund, or the additions made to it, was only in the line of his duty, and had no more effect to change the character of the subsequent deposits than it had to deprive the plaintiff of the benefit of the original one. It is impossible to differentiate the last sum deposited to the credit of the trust account by the trustee from the first one. They must all be held to have been made for the same purpose, and consequently impressed with the same trust for the benefit of the plaintiff.

Since there was no proof, and no finding by the trial court, that the act of the trustee in increasing the amount to the credit of the trust account from time to time was with any different intention from that which accompanied the original deposit, the law cannot separate the several transactions, and give one character to the first deposit and another character to those made afterwards. All this court has the power to do

is to take the findings of fact as they are, and draw from them the proper legal conclusion.

The result is that the plaintiff was entitled to the whole sum to the credit of the trust account, including accumulated interest, on the day that the account in plaintiff's name as beneficiary was closed by the act of the trustee. This court may affirm, reverse, or modify a judgment brought here for review, "or grant to either party such judgment as such party may be entitled to." Code, § 1337. This means, of course, such judgment as a party may be entitled to upon the facts found, since we cannot review the facts, or even look into the record to see whether they are supported by evidence, or whether some other facts should be supplied.

In so far as the judgment in this case denied the right of the plaintiff to recover the whole fund as it existed in the trust account on the day that account was closed, it should be reversed, upon the plaintiff's appeal, with costs, and judgment ordered for the plaintiff for the whole amount of the deposit as it stood on the 7th of January, 1889, with interest.

CHAPTER IV.

THE CREATION OF IMPLIED TRUSTS.

Resulting Trusts.

LUFKIN v. JAKEMAN.

188 Mass. 528, 74 N. E. 933. 1905.

Appeal from Probate Court, Suffolk County.

Actions by one Lufkin and others against one Jakeman (alias), and by one Lawrence against one Lufkin and others. Decree for plaintiffs in the first case, and decree of the probate court in the second case reversed, and the accounts of a special administrator allowed.

KNOWLTON, C. J. The first of these cases presents the question whether the plaintiffs are entitled to certain real estate under a resulting trust, as the heirs of their father, Richard Lufkin, or whether it belongs to the defendant, the holder of the legal title. The property was bought by Richard Lufkin in 1877, and paid for with his money, but the title was taken in the name of the defendant. He occupied it, erected valuable buildings upon it, received all the rents and profits, and paid all taxes upon it until his death, in 1901. His purchase and payment created a resulting trust in his favor against the defendant, who held the title as trustee for his benefit. McDonough v. O'Neil, 113 Mass. 92-95; Bailey v. Hemenway, 147 Mass. 326-328, 17 N. E. 645; Cooley v. Cooley, 172 Mass. 476, 477, 52 N. E. 631; Ward v. Ward, 59 Conn. 188, 22 Atl. 149. The rule that, when the person paying the consideration for real estate is under a natural or legal obligation to provide for the person who takes the title, there is a presumption of a gift and no presumption of a resulting trust, does not affect the present case. The plaintiffs' intestate was under no such obligation to the defendant. See Cooley v. Cooley, 172 Mass. 476, 477, 52 N. E. 631; Jaquith v. Massachusetts Baptist Convention, 172 Mass. 439—445, 52 N. E.

544. He was engaged to be married to her whenever his wife should obtain a divorce from him and leave him free to marry again. It has been decided that a relation of this kind will not take a case out of the ordinary rule that creates a resulting trust in favor of him who pays the purchase money. Soar v. Foster, 4 Kay & Johnson 152; Ward v. Ward, 59 Conn. 188, 22 Atl. 149; Ryder v. Kidder, 10 Ves. 360; Todd v. Morehouse, L. R. 19 Eq. 69; In re De Visne, 2 De G. J. & S. 17; Beecher v. Major, 2 Drew & Sm. 431.

Moreover, where there is a presumption of a gift, it may be rebutted by parol evidence. Danna v. Danna, 154 Mass. 491, 28 N. E. 905; Cooley v. Cooley, 172 Mass. 476, 52 N. E. 631; Ward v. Ward, 59 Conn. 188, 22 Atl. 149. In this case the evidence tends to disprove any presumption of a gift, and the master has found that the purpose of the intestate was not to make a gift to the defendant. * * *

Constructive Trusts. Actual Fraud or Other Wrong-doing.

DOWD v. TUCKER.

41 Conn. 197. 1874.

Bill in equity to compel the defendant to convey to the petitioner real estate which the defendant received under the will of Frances M. Hayden.

PARK, C. J. This case is clearly one of fraud. We have held on the present circuit, Ayres v. French, ante, page 142, in accordance with numerous decisions, that whosoever buys personal property with a preconceived intention not to pay for it, is guilty of fraud. This case is similar in principle. It matters but little whether the property is real or personal estate. Whosoever buys real estate with a preconceived secret intention not to pay for it, but to cheat the grantor out of it, is as much guilty of fraud as he would be if the property was personal estate. Apply this principle to the case we have in hand. The property in controversy belonged to Frances M. Hayden, and while it was yet hers to be disposed of as she pleased, she informed the respondent that she desired to give it to the petitioner if he was willing, and asked him if he was willing, again expressing her

desire so to give it. A codicil to her will had been at this time prepared and lay before her ready to be executed. The respondent knew by the inquiry and by the preparation what her purpose was. She had previously, by a duly executed will, given all her property to the respondent. He knew now that she had changed her mind, and was about to give the real estate in question in legal form to the petitioner, but that she desired his consent to the change, if it could be obtained. He immediately resorted to deception. He substantially expressed his entire assent to the change, but suggested the mode in which it would best be accomplished in her weak condition. He said, in effect, let me take the property, as you have already willed it to me, and when it comes into my hands I will deed it to the petitioner, and in that way your present desire with regard to the disposition of the property will be carried out, as much as it would be by executing the codicil; therefore in your weak condition do not trouble yourself about it. She was satisfied that the petitioner would have the property in the way proposed, and so expressed herself, and consequently the codicil was left unexecuted; or, in other words, she let him have the property on his promise to convey it to the petitioner.

Now it is a presumption of law that a party intends to do what in fact he does; and the fact appearing in the case that after the property came into the hands of the respondent, he at all times absolutely refused to convey it to the petitioner, it must be that during some period of time previous to his first refusal he must have so intended; and inasmuch as there is nothing in the case which goes to show a different intention at any previous time, it is reasonable to presume that this intention existed during the short period of time that had intervened since the promise was made, and existed at the time it was made; from which it follows that the promise was made in bad faith, with the dishonest intention to do what he afterwards did. If this was so, then the case is clearly one of fraud. It is the case of one obtaining the conveyance of property by a promise, which he has no intention at the time to fulfill.

But it is unnecessary to pursue this question of fraud, for the case otherwise is palpably one where the respondent holds the property in trust for the petitioner, whether he made the promise in good or bad faith. If A, knowing that B is about

to convey certain real estate to C, which the latter has purchased of him, should say to B, "Convey the property to me and I will convey it to C," and B should accede to the request and convey the property to A, no one would question but that A would hold the property in trust for C. Is this case any different in principle? Mrs. Hayden was on the point of giving this property to the petitioner by the execution of a codicil to her will, which had been prepared. The respondent knowing the fact, said to her in effect, "Let me have the property by the will you have already executed and I will convey it to the petitioner." The respondent by this promise obtained the property. It would seem that no argument need be made to show that he holds it in trust.

But it is said that she did not intend to execute the codicil unless the respondent was willing that she should do so. We do not so understand the report of the committee. But grant that it was so; did he not in the plainest and most unmistakable language give her to understand that he was willing? What did she desire to have done? She wanted the petitioner to have the property. What request did she make of the respondent? She asked him if he was willing that the petitioner should have it. Whether the conveyance was to be made in one form or another was of no consequence, and formed no part of the substance of the inquiry, although he took it for granted that she intended to do it by executing the codicil that lay before her, which was in fact her intention. What reply did he make? He said that she was weak, that she need not trouble herself to sign the paper (meaning the codicil), that he would deed the property to the petitioner, and would do just as she wanted to have him; that is, I will do just what you ask my consent to have done; therefore do not trouble yourself in your weak condition to execute the codicil. If this language does not convey a consent that the petitioner should have the property, then language in any form of words would fail to express the idea.

It follows therefore that the respondent obtained the property in question by his promise to convey the same to the petitioner, and consequently we think he is bound in equity and good conscience to make the conveyance.

We advise the Superior Court to grant the prayer of the petition. In this opinion the other judges concurred.

Constructive Trusts. Fraud Presumed from Fiduciary's Transactions with Respect to Trust Property.

CHURCH v. WINTON.

196 Pa. St. 107, 46 Atl. 363. 1900.

Action by Charles J. Church and others against William W. Winton and others to enforce a trust and for an account. Judgment for defendants, and plaintiffs appeal. Affirmed.

MITCHELL, J. The law governing this class of cases is entirely well settled. If a trustee buys the trust property, even at a public sale, which is brought about or in any way controlled by himself, he will be presumed to buy and hold for the benefit of the trust. But the trustee's title as purchaser is not void; it is voidable only, at the option of the cestui que trust; and when the latter has knowledge of the facts he must assert his right with reasonable diligence.

A review of the material facts is all that is required to show the proper application of the law in this case.

In 1871, W. W. Winton, being the holder of the legal title, executed a declaration of trust in favor of Joseph Church for an undivided fourth of the land in question. In this declaration his wife, Catharine Winton, whose representatives and heirs are among the parties defendant, joined. Why she did so does not appear. The learned judge below held that her joining in the declaration was conclusive of notice of the trust, but on the technical ground that she had no title he held that she could not be declared a trustee. It is not entirely clear that she had not title of some kind, though it is not disclosed, for we may say, in passing, that the transactions shown, including the various deeds and agreements between Winton, Dean, and the other owners, make it manifest that the parties had intimate business relations that have not been made known. Whether this results from the death of the principal parties who knew, or the failure of those that are left to make full disclosure, is not material, but the fact is patent. But, whether Catharine had any title or not, in view of her express declaration she was not in position to deny the trust; and if she, or those claiming under her, were shown to have any of the property in their possession, her declaration

would be conclusive of her duty to account. But the error of the learned judge, for reasons which will be stated later, was immaterial.

Prior to Winton's acquisition of the title, and, of course, prior to the trust, Church was indebted to Winton under a judgment recovered in 1869. In 1877 a scire facias to revive this judgment was issued, served, and judgment entered for want of an affidavit of defense. Execution was issued, and the sheriff sold the whole interest of Church in the land in suit to Winton. The title under this sale is the hinge of the case. Rules to show cause why the sale should not be set aside were granted by the court, though the record and the proofs fail to show at whose instance. But the rules were discharged, the sheriff's deed to Winton made and acknowledged, and the latter and those claiming under him have been in possession from that time till the present. The judge finds that there is no sufficient evidence that Winton ever recognized the trust after his entry under the sheriff's deed. Church lived until 1898, but neither he nor any one claiming under him made any move to assert his equity as cestui que trust against the purchase by his trustee until more than 21 years after the sheriff's sale. It was then far too late. As was well said by the learned judge below, if the rules to set aside the sale were obtained by Church, he had his day in court; and if they were not obtained at his instance, he ought not to have waited 21 years to overcome the natural effect of the sale. A much shorter period would have been sufficient to bar his claim in equity on account of laches, for, as already said, the cestui que trust must assert his equity with reasonable diligence. But, beyond the ground of laches, where no actual fraud is shown, equity adopts the period of the statute of limitations, as was said in Musselman v. Eshleman, 10 Pa. St. 394, a case on all fours with this, and 21 years make an absolute bar.

Winton therefore acquired Church's title freed from all equities, and when subsequently his own title and interest were sold by the sheriff on a creditor's judgment, and purchased by Catharine Winton, she acquired a title clear of any relation of trust that she may have had before the sheriff's sale in 1877.

Judgment affirmed.

CHAPTER V.

THE TRUST PURPOSE—PRIVATE TRUSTS.

Spendthrift Trusts.

BROADWAY NATIONAL BANK v. ADAMS.

133 Mass. 170. 1882.

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semiannually, to my said brother, Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid to him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plain-

tiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. Braman v. Stiles, 2 Pick. 460. Perkins v. Hays, 3 Gray 405. Russell v. Grinnell, 105 Mass. 425. Hall v. Williams, 120 Mass. 344. Sparhawk v. Cloon, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223a. Blackstone Bank v. Davis, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason, that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and puritie of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in Sparhawk v. Cloon, above cited, from the time of Lord Eldon the rule has prevailed in

the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the cestui que trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. Brandon v. Robinson, 18 Ves. 429. Green v. Spicer, 1 Russ. & Myl. 395. Rochford v. Hackman, 9 Hare 475. Trappes v. Meredith, L. R. 9 Eq. 229. Snowdon v. Dales, 6 Sim. 524. Rippon v. Norton, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. Tillinghast v. Bradford, 5 R. I. 205. Heath v. Bishop, 4 Rich. Eq. 46. Dick v. Pitchford, 1 Dev. & Bat. Eq. 480. Mebane v. Mebane, 4 Ired. Eq. 131.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. Holdship v. Patterson, 7 Watts 547. Shankland's appeal, 47 Penn. St. 113. Rife v. Geyer, 59 Penn. St. 393. White v. White, 30 Vt. 338. Pope v. Elliott, 8 B. Mon. 56, Nichols v. Eaton, 91 U. S. 716. Hyde v. Woods, 94 U. S. 523.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to

him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the cestui que trust which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being mislead by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire jus disponendi, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but

they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

Bill dismissed.

CHAPTER VI.

THE TRUST PURPOSE—CHARITABLE TRUSTS.

Charitable Trusts. Religious Purpose

McALISTER v. BURGESS.

161 Mass. 269, 37 N. E. 173. 1894.

Bill by George McAlister and others against Benjamin F. Burgess and others, executors of the will of Jane D. Royce, deceased, to set aside the residuary clause of said will. The case was heard on bill and demurrer, and reserved for the whole court. Bill dismissed.

BARKER, J. By the residuary clause of her will, the testatrix gives property, which is said to be about $20,000 in value, "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of Boston and vicinity." The respondent corporation of that name was chartered by St. 1857, c. 154, "for the purpose of securing the constant maintenance in said Boston of evangelical preaching for the young and the destitute, with free seats; for the employment of colporteur and missionary laborers in Boston and elsewhere; for the purpose of providing suitable central apartments to other and kindred benevolent and missionary societies; and for the general purpose of ministering to the spiritual wants of the needy and destitute." The bill is brought by the next of kin of the testatrix, who contend that the residuary clause is void because creating a trust contrary to the rule against perpetuities, and because the clause is so indefinite and uncertain that its provisions cannot be carried out; and they ask that the executor be directed to pay the residuary fund to the next of kin of the testatrix, in accordance with the laws of distribution. The attorney general has been made a party, and, by his answer, claims that a valid public charity was created by the clause quoted. The Evangelical Baptist Benevolent & Missionary Society contends that the clause gives it the residue of the estate as an abso-

lute gift, adding that if it shall be decided that the gift was not absolute, but in trust for the benefit of poor churches in Boston and vicinity, it will accept and administer the trust, and contends that on either construction of the clause the bequest is valid. The executor takes no position upon the question whether the gift is absolute or in trust, but demurs on the ground that the bequest is a valid one, and that the next of kin have no right to claim the fund as undevised property.

A gift of property, to be lawfully applied for the benefit of an indefinite number of persons, by bringing their minds or hearts under the influence of religion, is a charity, in the legal sense, within the terms of the definition given in Jackson v. Phillips, 14 Allen 539, 556. As held in Baker v. Fales, 16 Mass. 488, 495: "The very term 'church' imports an organization for religious purposes, and property given to it eo nomine, in the absence of all declaration of trust or use, must, by necessary implication, be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God." It follows that the legitimate use by a church of property so given must result in its application for the benefit of those who attend upon, or are within the sphere of the influence of, the services of the church, by bringing them under the influence of religion. It is a matter of common knowledge that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons; and there can be no question that an indefinite number of persons is constantly benefited by having their minds and hearts brought under the influence of religion by poor churches of the city of Boston and vicinity.

Grants and donations both of real and personal estate may, consistently with existing laws, be made to churches, and provision is made by the statute law for the manner in which such grants and donations shall be held. Pub. St. c. 39, §§ 1-3. There seems to be no reason, therefore, why a gift of property to one or more churches should not be held a charitable gift, and none why, if it is given in trust, the trust should not be held a trust for a public charity, and not subject to the rule of law against perpetuities.

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Charitable Trusts. Eleemosynary Purpose. Cy Pres Doctrine.

DARCY v. KELLEY.

153 Mass. 433, 26 N. E. 1110. 1891.

Bill by Richard Darcy and others, the children of a sister of Patrick Lane, for the construction of Lane's will.

KNOWLTON, J. It is not expressly stated in the bill that the plaintiffs' mother, Elizabeth Darcy, died intestate, and that they succeeded to her rights in real estate. But they allege that if the trust is void for uncertainty, or for want of proper parties, they are entitled to share in the premises as heirs at law of Patrick Lane. This they could not do otherwise than as heirs at law of their mother, and perhaps it may fairly be inferred, on all the allegations of the bill and answers, that the plaintiffs succeeded to their mother's real estate, and that they are entitled to be heard on the question whether the real estate held by the trustee under the will of Patrick Lane passed to the testator's heirs at law. Their right to sue has not been questioned by the defendants.

The third clause of the will is as follows: "Upon the decease or marriage of my wife, I give and bequeath and devise all of my said property and estate to the parish priest who may then be in charge of the Catholic church in Fall River, (now St. Mary's,) in trust to be disposed of as follows, to-wit: The said parish priest shall put the said property and estate, or the proceeds thereof, into the hands of the Sisters of Charity, for the purpose of a relief fund for the poor; and the same shall be devoted and appropriated, in the first place, to the aid of my poor relatives, if any such there be, according to the discretion of the Sisters of Charity; afterwards the said property and estate, and the proceeds and income thereof, or such part of either or both as may be deemed expedient by the said Sisters of Charity, shall be, at such times and in such sums as they shall deem proper, bestowed upon proper objects of charity, in their discretion."

The greater part of the testator's property was real estate, and this is now held by the defendant Kelley as trustee under this clause of the will. In interpreting the will, we must first

endeavor to ascertain the intention of the testator, and then see whether it can be carried out. After the death of the widow, the property was to be used as "a relief fund for the poor," and was to be appropriated, in the first place, to the aid of his poor relatives, according to the discretion of the Sisters of Charity, and afterwards was to be bestowed in such sums as they should deem proper upon proper objects of charity. Did the testator intend this as a private trust for the benefit of his poor relatives living at the time of his death, or at the time of the death of his widow, or did he intend to establish a public charity? If it is a private trust, his poor relatives, inasmuch as there has been no selection by the trustees mentioned in the will, are those who would take under the statute of distributions, although the trustees in making a selection might have chosen from a larger class. Brown v. Higgs, 4 Ves. 719, notes 4-6; Supple v. Lowson, 2 Amb. 729; Salusbury v. Denton, 3 Kay & J. 529, 539; Longmore v. Broom, 7 Ves. 124; Cole v. Wade, 16 Ves. 27. But it seems evident that the testator did not intend to limit his bounty to so small a class. This property is given "for the purpose of a relief fund for the poor." This broad statement completely describes the general nature of the gift. It includes all the poor, and opens to the discretion of the trustees a field as broad as the world. He then provides more specifically that a preference shall be given to his poor relatives, "if any such there be;" meaning such persons as may at any time in the future, while the trust continues, be related to him by blood. The charity is obviously of a public nature, and it is, in its terms, within the familiar definitions of a public charity. * * *

It is alleged and admitted that there was no such organization as the Sisters of Charity, and there is no one else designated in the will to exercise discretion in the administration of the trust, or to determine the mode of its administration. But it has been decided in this commonwealth that a devise of this kind is a good charitable trust, and that the court will not permit it to fail for want of a trustee, but will take upon itself its administration by devising a scheme and appointing instrumentalities for its management. Fellows v. Miner, 119 Mass. 541; Minot v. Baker, 147 Mass. 348, 17 N. E. Rep. 839, and cases cited; Bullard v. Chandler, ubi supra.

In such a case the court will appoint a master to investigate the facts, and report a plan to carry out the general purpose of the testator, as nearly as possible, in the mode originally contemplated, and will make such a decree on the whole case as will establish the trust, and make it effectual in the best way.

It is contended by the plaintiffs in the present case that the decree entered in a former suit in reference to this trust conclusively determines that the testator's heirs at law are the only relatives who can receive any benefit from the trust, and that, as private beneficiaries, they are entitled to the whole fund. It does not very clearly appear on what ground the court proceeded in making that decree, and we are not inclined to give it effect as settling anything beyond the right of Elizabeth Darcy and Mary Ann Nolan to receive the sums which were awarded to them, respectively, at that time, and their right afterwards to be considered as members of the class to be benefited. A master was appointed to hear the parties, and report all the facts as to their condition, and the condition of the property, and the doings of the trustee in regard to it; and it appeared by his report that both of them were poor and in needy circumstances, and that Elizabeth Darcy was being supported by the charity of a son-in-law. Upon the facts found it was proper that each of them should receive a part of the proceeds of the fund, and the decree, although not in accordance with the usual practice of the court in dealing with a public charity, is not necessarily inconsistent with a finding that this was a public charity, and that the court, on the facts reported, would make an order for a payment to each of two persons of the preferred class to be benefited, and for payments by "the trustee, from time to time, of further sums, according to their needs and in his discretion, with liberty to either or both to apply to this court or a justice thereof, in term-time, or vacation, for other and further relief, or to compel the said Murphy or his successors in said trust to comply with the terms of this decree, and to carry out the provisions of the will." It may be that on the particular facts shown this was intended as a partial distribution of the funds of a public charity, leaving the further administration of the trust for a future time. At all events, on those facts, without reference to the form of the decree, the payments made were in accordance with the will of the

testator, and, if it was intended to treat the trust as private, that does not so clearly appear as to prevent the court from making such a further decree as the provisions of the will require.

The case must be referred to a master to report the facts and a scheme for the administration of the trust.

So ordered.

CHAPTER VII.

THE TRUSTEE — HIS APPOINTMENT, QUALIFICATION AND POWERS.

Trust Does Not Fail for Want of a Trustee.

IN RE ESTATE OF PETRANEK.

79 Iowa 410, 44 N. W. 685. 1890.

Petition in probate to compel payment of a legacy. In the last will and testament of Albert Petranek, deceased, it is provided among other things as follows: "I hereby give, devise, and bequeath to Franz Sevcik and Fred. Huble in trust for the benefit of the Catholic Church on my farm in Tama county, Iowa, the sum of eight hundred dollars, and hereby direct that they or their successors shall invest said money safely for the benefit of said church, and that services be held in said church for my soul yearly." Vencel Ulch, Joseph Sebesta, and Michael Silhonek, members and trustees of said church, filed their petition in the district court of Tama county against said Franz Sevcik and Fred. Huble, alleging that they declined to accept said money and execute said trust, but desired to be excused therefrom, and were willing and anxious that the court should appoint the petitioners in their stead, to carry out said provisions of the will. Sevcik and Huble made default and, on October 4, 1887, a decree was entered "that the issues are found for the plaintiffs, and decree as prayed for in said petition. Vencel Ulch, Joseph Sebesta, and Michael Silhonek are appointed trustees of the fund, and Franz Sevcik and Fred. Huble removed thereby." On October 14, 1887, said Ulch, Sebesta, and Silhonek filed their petition herein, asking an order upon the executor to pay them said legacy. J. J. Mosnet, executor, answers, denying that the district court had jurisdiction to remove said Sevcik and Huble, or to appoint these petitioners, and that, upon the petition of the heirs of the deceased to set aside said bequest as void, it was decided by the supreme court, (39 N. W. Rep. 685,)

that said Sevcik and Huble were legatees, and that the legal title to said money was in them. The matter was submitted to the court, and an order made upon the executor to pay over the legacy, $800, to the petitioners, within 30 days, and that the executor pay the costs, to which executor excepts, and from which order he appeals.

GIVEN, J. 1. The only question presented in argument is whether the district court had authority to remove Huble and Sevcik, and appoint the petitioners. Appellant's contention is that Huble and Sevcik are not trustees, but legatees, and therefore the court had no authority to remove them, nor to designate others to occupy their place, under the will. In Perry v. Drury, 56 Iowa 60, 8 N. W. Rep. 745, the will under notice contained bequests to the "trustees of funds and donations for the diocese of "Iowa," and to the "bishop of the diocese of Iowa," in which it is expressed as being "in trust" for purposes named. In the bequest to the board of missions it is directed that "the said sum shall be invested by the board, and the interest accruing therefrom each year shall be applied by the said board in the support of missions in the diocese of Iowa." These trustees, board, and bishop petitioned the court for an order on the executors to pay the legacies. The prayer of the petition was denied, and an order entered requiring the plaintiffs to execute bonds as prescribed by Code, § 2350, which provides that "trustees appointed by will or by the court must qualify and give bonds the same as executors, and shall be subject to control or removal by the court in the same manner." From this order the plaintiffs appealed, claiming that they were not trustees, but legatees under the will; thus presenting the identical question that is now urged.

It will be seen, from what we have stated, that the bequests in that will and in this are identical, so far as it affects the relations of the persons named in the wills. In that case the court say: "Two classes of persons may take personal property under a will. The first class includes those who take property to hold for a determinate period, and at the expiration thereof it is to be transferred to the beneficiaries under the will. Such persons are in no sense legatees. They are merely trustees. The other class includes those to whom personal property is be-

queathed, and who are charged with certain trust duties in respect thereto. They are, in fact, legatees charged with executing the benevolent or other purposes of the testator. Considered in their relations to the testator and the will, they are legatees. Regarded in their relations to the beneficiaries of the property which they take under the will, they are charged with trust duties.

But they cannot be called trustees without words of qualification. They take the property as legatees, and in their relations to the will, and in the settlement of the estate, are known and designated as such. The plaintiffs belong to the second class above designated, and in the proceedings relating to the estate in the probate court are to be regarded and designated as 'legatees,' and not as 'trustees.' They do not, therefore, come within the provisions of Code, § 2350."

It cannot be questioned but that under said section 2350 the courts have power to remove trustees appointed in wills, for sufficient cause, and to appoint others to administer the trust; but, clearly, no such power can be exercised as to legatees. To do so would put the court in the place of the testator. Seda v. Huble, 75 Iowa 429, 39 N. W. Rep. 685, was an action by the heirs of this testator to declare this bequest void upon the grounds, among others, that the church named had no legal existence, and that the church is prohibited from holding or taking any property. This court held that "the legal title to the money is in the persons named, coupled, however, with the trust," and that it was immaterial whether the church is prohibited from holding property or not, because the money is not devised to the church, but to the parties named in the will. It follows from these cases that Frank Sevcik and Fred. Huble were legatees, charged with the trust of carrying out the purposes of the testator with respect to the money bequeathed. While they were legatees in such sense as to be exempt from giving bond, yet, in view of the power and duty of courts of equity to see that such trusts are fully and faithfully carried out, and that they do not fail for want of a trustee to execute them, our conclusion is that Sevcik and Huble were in such sense trustees as that, upon their refusing to act, or for other good cause, the court might properly appoint others to execute the trust.

It is contended that, as there was a qualified and acting executor, and the estate unsettled, there was no necessity for appointing trustees. It is a sufficient answer to say that the executor had no power over this bequest beyond paying it to the persons authorized to receive it. The order of the district court is affirmed.

CHAPTER VIII.

THE TRUSTEE—HIS DUTIES, RIGHTS, LIABILITIES AND REMOVAL.

Duty with Respect to Dealings with the Trust Property.

HAYES v. HALL.

188 Mass. 510, 74 N. E. 935. 1905.

Petition by Joseph K. Hayes, Jr., against George F. Hall and others. On reserved exceptions to master's report. Sustained.

BRALEY, J. The rule that a trustee, in the management of property held by him in trust, shall not be permitted, directly or indirectly, to derive any personal advantage from its use or sale, but must act solely for the interests of those beneficially interested, has often been referred to and approved by this court. * * *

The foundation of this rule has been said to be the presumption that the trustee in dealing with the trust estate, where by its purchase his pecuniary interest is concerned, will not be disinterested. If permitted to expose himself to this temptation, ordinarily he would consider his own advantage, and not that of those who are dependent upon his integrity and sound judgment for the wise and proper administration of the trust property. The Aberdeen Railroad Co. v. Blakie, 1 Macqueen, 461, 478, 479.

But where trust property is sold under a decree, the court determines and directs the manner of its sale, and permission to bid is sometimes given to the trustee, but only after notice, upon hearing all parties interested, and when it appears that such a course will be advantageous to the trust. Colgate's Ex'r. v. Colgate, 23 N. J. Eq. 372, 383.

With this exception, sales either to himself, or to others upon a secret arrangement for his benefit or by him after he thus gets title, to purchasers with notice, or to his wife or relations,

for a less price than he could have obtained from other buyers, are voidable at the election of the cestuis que trust. Oberlin College v. Fowler, 10 Allen 545.

They may resort to a court of equity either to compel a reconveyance upon payment of the purchase price, or to require the property to be resold; or upon their affirmation of the sale, if the trustee has sold it in excess of the price paid by him, he must account for the proceeds, or, if unsold, they may charge him in his account with its actual value at the time of the sale. Morse v. Hill, ubi supra; Rotch v. Morgan, 105 Mass. 426, 430.

In the present case, George S. Hall by the declaration of trust is shown to have founded it for his own benefit as beneficiary for life, with remainder for life to his sons, their wives, and to his grandchildren, who also were to take the principal. The board of trustees consisted of himself, his son, George F. Hall, and Joseph K. Hayes, Jr., who was the only person outside of the family connected with its administration. They had not given bonds, nor were they required to render any account of their trusteeship, neither was there any provision in the instrument for the filling of vacancies caused by death or resignation. Apparently the management of the estate had not been entirely satisfactory to Hayes, for upon filing his account in which all the trustees must be deemed to have joined, he asked permission to resign, though subsequently this request was withdrawn. See Dodd v. Winship, 133 Mass. 359, 361.

The superior court, under its general equity jurisdiction, had authority to receive and pass upon their accounts as rendered, and to make all proper orders and decrees. Rev. Laws, c. 147, § 5; Bowditch v. Banuelous, 1 Gray 220; Bradstreet v. Butterfield, 129 Mass. 339.

Thereupon that court directed that the accounts be referred to a master for examination, whose report, with the exceptions of George F. Hall thereto, raise the questions presented for our decision.

Among the assets of the trust which the settler delivered to the trustees was a promissory note for $74,279.85, made by George F. Hall, and secured by a mortgage of his real estate, on which there was outstanding a first mortgage to the Massachusetts Loan & Trust Company for $158,279.85. A default having been made in the performance of the conditions of the

first mortgage, the mortgagee foreclosed, and, as the purchaser at the foreclosure sale failed to pay the purchase money, the property was again advertised for sale. The trustees are found to have believed that the estate was worth at this time a sum in excess of $200,000, which also was its value as determined by the master. But they did not consider it advisable to bid at the sale, or buy the property for the benefit of the trust, and their action has been approved by him as judicious.

After this decision had been reached, George F. Hall, without the knowledge of Hayes, who appears to have been the only one of the remaining trustees competent at the time to act, procured one Vialle to attend the sale and purchase the property, to whom it was conveyed for the amount of his bid, subject to accrued taxes, making the entire consideration $150,000.

In procuring the attendance of Vialle, who subsequently conveyed the property thus bought to Mary S. Hall, the wife of George F. Hall, the latter claimed that he acted solely at her request, and that the purchase in reality was made for her with money she borrowed for this purpose. The performance of this service, and nothing more, simply made him a messenger, and might be found consistent with his duty. But if, as her agent and husband, his purpose was to procure the property either for her or his own benefit at the lowest possible price, then his conduct would be antagonistic to the performance of the duties of his trusteeship, which required him to realize the highest obtainable price.

It is urged that the intimate character of the marital relation is such as generally to exclude the conception that the husband would act disinterestedly, and without regard to the financial interests of his wife. But we now are not called upon to decide whether under all circumstances a purchase by and conveyance to her of property held in trust by her husband would be held voidable when paid for out of her separate estate, even where the trustee himself was not authorized to buy. See Dundas's Appeal, 64 Pa. 325; Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97.

The trustee seriously contends that as the sale was made by a stranger, and not by himself, it is not within the inhibition already discussed. But this position cannot be sustained.

In the practical application of this rule it makes no difference

that the purchase was made under a foreclosure sale at public auction, held by a first mortgagee, of property on which at the time there was a valid outstanding second mortgage held by the trustees, and forming a very considerable part of the assets of the trust estate. Marshall v. Carson, 38 N. J. Eq. 250, 255, 48 Am. Rep. 319.

The wrong would be none the less grievous, or the loss less appreciable, if through his co-operation a junior incumbrance which otherwise would be valuable is made worthless, when accomplished indirectly under a sale by a mortgagee, than where it is brought about directly by a sale on the part of the trustee himself. Morse v. Hill, ubi supra; Dyer v. Shurtleff, ubi supra; Marshall v. Carson, ubi supra.

Any assent that may have been given by the other beneficiaries to the course pursued was not binding upon Henry F. Hall, or his wife, Marian E. Hall, who claim that by reason of his conduct George F. Hall must be held accountable, as trustee, with the difference between the purchase price and the value of the mortgaged property.

They apparently do not wish to redeem, or to demand a resale of the equity of redemption, but, electing to affirm the foreclosure, claim that he should be charged in the settlement of the account with this difference. Morse v. Hill, ubi supra.

Under the master's finding that his associate trustees did not join with him, but were ignorant of the course pursued, if it was determined to be wrongful, they would not be chargeable at common law with the loss incurred. Ames v. Armstrong, 106 Mass. 15; Abbott v. Fisher, 124 Mass. 414, 417; Brice v. Stokes, 11 Ves. 314.

We cannot, however, properly assume in favor of the contestants as the master leaves the case—that Hall should be deemed guilty of unfaithful administration, and therefore accountable for the depletion of the trust estate.

To correctly determine the true character of his participation in the transaction, there should be a full inquiry as to all the circumstances attending the purchase of the property at the second foreclosure. When this has been done, and the facts found and reported, but not before, it properly can be decided whether he was delinquent, and hence chargeable with any loss to the estate caused by his delinquency, or whether his conduct,

being compatible with his duty, entitles him to complete exoneration.

By the terms of the reservation under which the case is before us, the first exception to the master's report must be sustained.

Decree accordingly.

Duty with Respect to Investments.

In re ARGUELLO'S ESTATE.

97 Calif. 196, 31 Pacif. 937. 1892.

Proceeding for an order to compel the administrator of the estate of Luis Antonio Arguello, deceased, to pay over to creditors funds in his hands belonging to the estate. So ordered. The administrator appeals. Affirmed.

BELCHER, C. This is an appeal by the administrator of the estate of the decedent from an order of the superior court of San Diego county, requiring him to pay to the creditors of the estate, whose claims had been duly presented and allowed, certain sums of money.

The sum of money in controversy was $4,846.80, which was received by the administrator, for and on account of the estate, between July 5, 1891, and October 15, 1891, and deposited by him in the California Savings Bank in the city of San Diego in his own name.

The court below found the facts to be as follows: "That, at the time said funds were deposited by said administrator in said California Savings Bank, said bank was reputed to be, and was considered, a safe and solvent bank and place of deposit, and was of good credit and standing, and was believed by said administrator to be solvent and safe; that said deposit was made in the individual name" of the administrator, "without any designation or indication of his representative capacity, but said administrator had no other funds or account with said bank, and deposited such with that particular bank for the express purpose of keeping the same separate from, and so that it would not be unnecessarily mingled with, his own property or individual funds; that in depositing said funds in said California Savings Bank, as aforesaid, said administrator acted in good

faith; that on the 12th day of November, 1891, said California Savings Bank became suddenly, unexpectedly, and wholly insolvent, suspended business, and has not been able to pay the amount so deposited by said administrator with it, or any part thereof; * * * that said administrator has been guilty of no negligence or want of care in the administration of said estate, except that he deposited such funds in the California Savings Bank in his individual name instead of in his representative capacity or in the name of the estate."

And as conclusions of law the court found that the administrator was responsible for the money so deposited by him, and that he must pay it over to the creditors of the estate.

The appellant contends that an administrator is only required to act in good faith, and to exercise such skill, prudence, and diligence in managing the affairs of the estate as men ordinarily bestow upon their own affairs; and that when he has in good faith, and with reasonable care, deposited funds of the estate in a bank, which have been subsequently lost by the failure of the bank, he will not be held liable for the loss, unless he has wilfully and unnecessarily mingled the trust property with his own, so as to constitute himself in appearance its absolute owner; and hence that, under the facts found in this case, the order of the court was erroneous, and should be reversed.

The question presented has many times been before the courts of England and of this country, and the decisions upon it have been practically unanimous, and to the same effect as the decision of the court below in this case.

The law upon the subject is stated in Perry on Trusts (section 443): "A trustee may deposit money temporarily in some responsible bank or banking house; and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss; * * * but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his own credit, and not to the separate account of the trust estate." And again, in section 463: "So, if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank."

A reference to a few of the numerous cases cited will be sufficient. In Com. v. McAllister, 28 Pa. St. 480, an administrator

had deposited in his own name funds of the estate in a savings bank, and they had been partly lost by a failure of the bank. The court, after stating the facts and reviewing the authorities, said: "But it is sufficient, for the present case, to say that where an administrator or trustee, with trust funds in his hands, deposits them in his own name in a bank or other institution which fails, the loss shall fall upon him; and his liability will not depend upon the good faith, prudence, or judgment with which, apparently, he may have acted, nor upon the fact that he may have disposed of his own funds in the same way."

In Williams v. Williams, 55 Wis. 300, 12 N. W. Rep. 465, and 13 N. W. Rep. 274, the plaintiff had in his possession as administrator a sum of money, and for safe-keeping, and greater security and convenience, deposited the same in a bank, taking a certificate of deposit in his own name for the amount. The bank was at the time in good credit and repute as safe, solvent, and in all respects trustworthy; and in making the deposit the administrator informed the teller, who received the money and gave the certificate, that the moneys were trust funds, and did not belong to him individually, but did not inform him to whom the money did in fact belong, nor give any directions as to the deposit being made or the certificate issued in any other than his individual name. Subsequently the bank failed, and the certificate became worthless and the amount wholly lost, except a small dividend which was made from the assets in the hands of a receiver. It was held, after a quite lengthy review of the authorities, that the administrator must bear the loss. The court said: "To hold the administrator answerable in this case is undoubtedly a great hardship; but to exonerate him from liability is to encourage the mismanagement of trust funds, and to open the doors to frauds innumerable against those whose age and weakness entitle them to the most rigid protection of the law. The rule, therefore, should not be slackened, even if the question were a new one, much less in view of the authorities cited."

In Naltner v. Dolan, 108 Ind. 500, 8 N. E. Rep. 289, attorneys had collected money for a client, and deposited it in a bank which was then in good standing, in their own name, but not mingled with their own money. The bank afterwards failed, and the money was mostly lost. It was held that the attorneys

must bear the loss. The court said: "In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate in some way that it is the principal's money. If he deposit in his own name he will not, in case of loss, be permitted to throw such loss on his principal, [citing cases]. In such case the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against the cestui que trust, that the fact is not as he voluntarily made it appear. * * * Whatever diversity of opinion may be found in respect to the rights of the bank or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited."

But, whatever may be the rule elsewhere, appellant insists that the rule in this state is declared in section 2236 of the Civil Code, and that that does not make him liable. The section referred to reads as follows: "A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events."

We do not think this section was intended to change the rule generally prevailing, or to limit liability under it; on the contrary,the section seems to be in entire accord with the general rule, and in effect to declare it in unmistakable terms. In our opinion the order appealed from should be affirmed.

CHAPTER IX.

THE BENEFICIARY—HIS CAPACITY, ACCEPTANCE, RIGHTS AND LIABILITIES.

Who May Be a Beneficiary. In Private Trust Must Be Definiteness.

MORICE v. THE BISHOP OF DURHAM.

10 Vesey 522. (Eng.). 1805.

Ann Cracherode by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, etc., upon trust to pay her debts and legacies, etc.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin, to have the will established, except as to the residuary bequest; and that such bequest may be declared void. The Attorney General was made a Defendant. The Bishop by his answer expressly disclaimed any beneficial interest in himself personally.*

THE LORD CHANCELLOR [ELDON]. This, with the single exception of Brown v. Yeall, Ante, vol. vii. 50, n., is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the Defendant, the Bishop of Durham, can according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand, a doubt has been raised in the discussion of some questions, bearing analogy to this, in another Court; how far it is competent to a testator to give to

* The statement of facts taken from report of the case in 9 Vesey 399.

his friend his personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, as far as this Court has to do with it, depends altogether upon this: If the testator meant to create a trust and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground according to the authorities: that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given, and it is the effect of his own will, and not the obligation imposed by the testament; the one inclining, the other compelling him, to execute the purpose. But, if he cannot, or was not intended to be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read, as if no such intention was expressed, or to be discovered, in it.

Pierson v. Garnet, 2 Bro. C. C. 38, 226, and other cases of that person; and the court has said, before those words of request whether a trust was intended arose from two or three circumstances; which must all concur, where there is no express trust. Prima facie an absolute interest was given; and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the court has said, before those words of request or accommodation create a trust, it must be shown, that the object and the subject are certain, and it is not immaterial to this case, that it must be shown, that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity, the alleged trustee is to execute the trust; and the property being so uncertain and indefinite, it may be conceived, the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that, which is technically called a trust. Wherever the subject, to be administered as trust-property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects are always used by the Court as

evidence, that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this Court applicable to a case, where the testator himself has expressly said, he gives his property upon trust. If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held, that, if he did not declare any trust, the persons, to whom the property was given, should take it. If he says, he gives in trust, and stops there, meaning to make a codicil, or an addition to his will, or, where he gives upon trusts, which fail, or are ineffectually expressed, in all those cases the Court has said, if upon the face of the will there is declaration plain, that the person to whom the property is given is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible therefore to contend that if this trust is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality" means something different from that idea, which in a court of justice we are obliged to apply to that word "charity" (and, I admit, we are obliged to apply it to many senses, not falling within its ordinary signification), there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly The Attorney General v. Whorwood, 1 Ves. 534, that the argument for a proportionate division, or a division of some sort would be displaced. I take the result of that case to be, that the substratum of that charity failed; and all those partial dispositions, that would have been good charity, if not

connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it, so built, the purpose, which is the foundation, failing, the superstructure must fail with it. The Attorney General v. Doyley, 4 Vin. 485, is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who are most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient; and the Court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held, that equality is equity, and there should be an equal division; but it is expressly declared, that those, who took, were persons, who could take under a bequest to charitable uses; and there was no difficulty in that case in saying those words must be construed according to the habit and allowed authorities of the Court.

The only case, decided upon any principle, that can govern this, is Brown v. Yeall ante, vol. vii., 50, m.; which applies strongly. I do not trust myself with the question, whether the principle was well applied in that instance; but the decision furnishes a principle which the Court must endeavor well to apply in cases that occur; I do not hesitate to say, I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer; yet he mistook his way; as Sergeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune, to accummulate for many years; and meaning, that it should be disposed of to charitable purposes, constituted a fund; expressly stating that his purpose was a charitable purpose; and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that Court, which according to the constitution of the country ordinarily administers property, given to charitable uses. In his opinion, therefore, independent of particular authority, there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms, that this Court could not execute it, that

trust was ill-declared, and must fail, for the benefit of the next of kin. The principle, upon which that trust was ill-declared, is this. As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in the case of mal-administration could be reformed, and a due administration directed; and then unless the subject and the objects can be ascertained upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration. That is the principle of that case. Upon the question whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say, that, where such a purpose was expressed, it was not a strained construction to hold, that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning; and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the Court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this Court, ought to be taken to have meant that.

Upon these grounds, in a subsequent case, Attorney General v. Stefmey, ante 22, as to the Welch charities, it appeared to me too much, considering the Society in this country for the propagation of the Gospel, etc., to say, a trust for the circulation of bibles, prayer-books, and other religious books was not good. Then, looking back to history of the law upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided, in which the Court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose; or devotes the property to purposes of charity in general. Upon those cases, in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those, in which the Court takes upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode, or the objects, but it falls upon the

King, as parens patriae, to apply the property, it is enough at this day to say, the Court by long habitual construction of those general words has fixed the sense; and, where there is a gift to charity, in general, whether it is to be executed by individuals selected by the testator himself, or the King, as parens patriae, is to execute it (and I allude to the case in Levintz, The Attorney General v. Matthews, 2 Lev. 167), it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense, which the determinations have affixed to that word in this Court: viz., either such charitable purposes as are expressed in the Statute (Stat. 43 Eliz. c. 4), or to purposes having analogy to those. I believe, the expression "charitable purposes," as used in this Court, has been applied to many Acts described in that Statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the Statute given to all the purposes described.

The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this Court; such, that this Court would have held the Bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity, in general; or is it, or may it be according to the intention, to such purposes, going beyond those, partially, or altogether, which the Court understands by "charitable purposes;" and, if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person, created the trustee, might give the property to such charitable uses, as this Court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and,

if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the Court could have charged him with mal-administration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal; though not acts of that species of benevolence and liberality, which this Court in the construction of a will calls charitable acts.

The question therefore resolves itself entirely into that; for I agree, there is no magic in words; and if the real meaning of these words is charity or charitable purposes, according to the technical sense, in which those words are used in this Court, all the consequences follow: if on the other hand the intention was to describe anything beyond that, then the testator meant to repose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those, to which we must look; considering them purposes, creating a trust; for, if there is as much of indefinite nature in the purposes, intended to be expressed, as in the cases, to which I first alluded, where the objects are too uncertain to make recommendation amount to trust, by analogy, the trust is ineffectual; the only difference being, that in the one case no trust is declared; and the recommendation fails; the objects being too indefinite; in the other the testator has expressly said, it is a trust; and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this Court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the Defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think, that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed. The consequence of Law is, that the Bishop takes the property upon trust to dispose of it, as the Law will dispose of it; not for his own benefit, or any purposes this Court can effectuate. I think therefore, this decree is right. Affirmed.

CHAPTER X.

THE BENEFICIARY—HIS REMEDIES.

The Beneficiary's Remedies Are In Equity.

NORTON v. RAY.

139 Mass. 230, 29 N. E. 662. 1885.

Contract, against the executrix of the will of Isaiah C. Ray, for money had and received. Writ dated May 12, 1883. The declaration also contained a count in tort, as follows: "The plaintiff says the defendant's testator, in his lifetime, made a declaration of trust, a copy whereof is hereto annexed, whereby he undertook and agreed to hold the property therein described for the benefit of the plaintiff, and to deed the same to him, his heirs and assigns, or to dispose of the same when and for his best advantage. And the said testator fraudulently, secretly, and without the knowledge or consent of the said plaintiff, conveyed the said property, by a good and sufficient deed, to one Mary A. Norton, the wife of the said plaintiff, and thus deprived the plaintiff of the use, enjoyment, or advantage of the same."

The copy annexed, signed by the defendant's testator, and dated January 2, 1866, was as follows: "Be it known that on the third day of July a deed of sale was made from the estate of Rodolphus Norton—on the twenty-seventh day of December, 1865, the same was acknowledged in my favor—of a certain lot of land, situated in the town of Edgartown in the county of Dukes, Commonwealth of Massachusetts, for the sum of five hundred dollars—and be it known that I now hold the same in and for the benefit of Wm. T. Norton in trust, and am ready at any and all times to deed the same to him, his heirs and assigns, or to dispose of the same, when and for his best advantage, he paying all expenses and charges for the same."

Trial in the Superior Court, without a jury, before Knowlton, J., who allowed a bill of exceptions, in substance as follows:

It appeared that, on December 27, 1865, Isaiah C. Ray, the

defendant's testator, bought at the plaintiff's request, with the plaintiff's funds and for his benefit, a dwelling-house and lot in Edgartown, and received a deed of it, running to himself and his heirs, without disclosing any trust. On January 2, 1866, Ray executed and delivered to the plaintiff the paper, a copy of which is annexed to the declaration.

On November 1, 1869, Ray executed a deed of this lot to the plaintiff's wife "during her natural life, if she remains unmarried." Ray sent this deed to the plaintiff's wife at Edgartown. She took the deed, got it recorded, and paid for recording it.

The plaintiff had no knowledge or information of the making of said deed until a short time before the commencement of this action, and did not authorize it in any way. At the time it was made, his wife lived apart from him, and has done so ever since. There was no evidence how or by whom the property was occupied or managed prior to that, but the plaintiff's wife has continuously resided upon it since. At one time, it did not appear when, Ray offered the plaintiff's landlady a sum of money, if she would get and bring to him the declaration of trust, without the plaintiff's knowing it.

The plaintiff claimed to recover, as damages, the value, at the date of the writ, of the estate conveyed by the deed to his wife. The judge found this to be $278.85, and found for the defendant; and at the plaintiff's request, and with the defendant's consent, reported the case to this court for its opinion upon the questions of law involved.

If, as matter of law, upon the foregoing facts, the plaintiff was entitled to recover, judgment was to be entered in his favor for $278.85, and interest thereon from the date of the writ, or such other order to be made as law and justice might require; otherwise, judgment for the defendant.

W. ALLEN, J. The plaintiff's only remedy is in equity. The case discloses a trust, and cannot be brought within the decisions in which it has been held that an action for money had and received will lie against a trustee by a cestui que trust to recover a liquidated sum due to him under the trust. Johnson v. Johnson, 120 Mass. 465, and cases cited. Davis v. Coburn, 128 Mass. 377. Judgment for the defendant.

The Beneficiary's Remedies Are Against the Trustee.

FELCH v. HOOPER.

119 Mass. 52. 1875.

Bill in Equity filed December 2, 1873, against David Hooper and Matilda H. Hooper, of Portland, in the State of Maine, alleging the following facts:

On August 16, 1873, David Hooper executed and delivered to the plaintiff a bond, a copy of which was annexed to the bill, and was as follows:

"Know all men by these presents that I, David Hooper, of Portland, county of Cumberland and State of Maine, am holden and stand firmly bound unto Mark C. Felch, of Somerville, county of Middlesex and State of Massachusetts, in the sum of five thousand dollars, to the payment of which to the said obligee or his executors, administrators or assigns, I do hereby bind myself, my heirs, executors and administrators.

"The condition of this obligation is such that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated on Wallace Street in Somerville, aforesaid, and bounded as follows, [describing it].

"The same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances.

"And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of eighteen hundred dollars, of which one hundred and fifty dollars are to be paid in cash upon the delivery of this bond, and the remainder, bearing interest after sixty days at the rate of eight per cent. per annum.

"Now therefore if the said obligor shall, upon tender by the said obligee of the aforesaid cash at any time within ninety days from this date, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

On the delivery of the bond the plaintiff paid to David Hooper the sum of $150, as required by the terms of the bond.

In view of the sale made to him as aforesaid and soon after the execution and delivery of the bond, David Hooper verbally authorized the plaintiff to enter upon the land and erect dwelling-houses thereon in such manner as the plaintiff might deem fit and proper, and thereupon the plaintiff proceeded to erect such buildings, and has almost completed one house on one of said lots, and has laid the foundation of another house on the other lot, and has laid out and invested therein a large sum of money, in the whole, nearly $2,500.

At and before the expiration of the ninety days mentioned in the bond, which expired on November 14, 1873, the plaintiff was ready to pay the balance of the purchase money, as therein provided; but as Hooper had not paid the annual taxes assessed upon the land by the city of Somerville on May 1, 1873, which constituted an incumbrance thereon, and did not pay the same until November 21, he could not before said last named day have given a deed of conveyance in accordance with the terms of the bond. On that day, immediately after the payment of the taxes by David Hooper, the plaintiff offered and tendered to him the whole balance of the purchase money for the land then remaining due to him according to the terms of the bond, and demanded from him a conveyance of the land which David Hooper refused.

The bill then averred on information and belief that afterwards on the same day, Hooper caused a deed to be recorded in the registry of deeds, purporting to be a conveyance of the land from him to the defendant Matilda H. Hooper, his mother; that this conveyance was merely colorable and without consideration, and made with the fraudulent intention of compelling the plaintiff to pay an increased price for the land or to lose the buildings which he has erected thereon.

The prayer of the bill was that the defendants be ordered by a decree of the court to execute, acknowledge and deliver to the plaintiff a deed of conveyance in conformity with the terms of the bond, on payment of the balance of the purchase money; and for further relief.

On December 6, 1873, an attested copy of the bill was served on the defendants at Portland, in the State of Maine.

On February 2, 1874, the defendants demurred to the bill on the ground that the court had no jurisdiction over them.

* * *

COLT, J. The question raised by this demurrer is not whether a contract for the conveyance of land in this Commonwealth can be specifically enforced against a defendant upon whom no service is made within this State, and who is not and never has been a resident. That question was decided in the case of Spurr v. Scoville, 3 Cush. 578.

The question here is whether under such a contract in writing the plaintiff who has paid or tendered the consideration, and has by the defendant's permission entered upon the land and made improvements thereon, can under our statutes, upon the allegations of this bill, enforce his equitable title to the land in any form.

In Spurr v. Scoville, it was said that the only effectual decree, which could be rendered upon the allegations in that case, would require a conveyance of the land in question by the defendant personally; and that courts of equity would not proceed in a cause, where the decree asked for required an absent defendant, not subject to their jurisdiction, to be active in its performance, but could deal only with persons who could be compelled by process to obey their orders. The decision is placed expressly on the ground that the suit was a proceeding in personam merely, in which no decree was sought against the property, and no allusion is made to statutory provisions which upon proper allegations might perhaps have afforded relief.

The case at bar, differs in this respect, and the plaintiff seeks to enforce an equitable right in the land itself. The bill, as amended, avers that the contract relied on and the payment and other facts alleged were sufficient to charge the land with a trust in the plaintiff's favor, which the defendants refused to perform by refusing to make the required conveyance. And a prayer is added that the land may be decreed to belong beneficially to the plaintiff, and may be conveyed to him by some person duly appointed by the court. To the bill as amended there is a special demurrer on the ground that the court has no jurisdiction of the parties.

The doctrine is well established in equity that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for

the purchaser, for the purpose of affording the latter a remedy against the estate. Atcherley v. Vernon, 10 Mod. 518, 527. Daniels v. Davison, 16 Ves. 249, 255. Waddington v. Banks, 1 Brock. 97. Lewin on Trusts, (3d ed.), 174, 175.

Our statutes give this court power to enforce the performance of a contract for the sale of land, made by a deceased person, and to order the executor or administrator to make a conveyance, which it is declared shall have the same force and effect as if made by the person who made the agreement to convey, thus giving effect to the deed of the legal representative although the legal title is in the heirs at law, and treating the subject matter of the contract as personal or real, according to the character which has been given to it by its terms. Gen. Sts. c. 117, §§ 5, 6.

Upon the facts stated in this bill, the land in question is charged with an implied trust in the plaintiff's favor; and the court is not powerless to enforce that trust, merely because the parties holding the legal title are beyond its reach. It is said that courts of equity will never allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint, by a statute which provides that when a person, seised of an estate upon a trust express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the objects of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require. Gen. Sts. c. 100, § 15.

This statute expressly includes implied trusts, and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute. Walsh v. Walsh, 116 Mass. 377. Most implied trusts are of the latter description. The statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject matter are within its reach. Ward v. Arredondo, Hopk. Ch. 213. The decree will be binding on absent parties to the extent of its effect on the land only, even though all parties interested have been notified in accordance with the rules of the court. In other states, under similar statutes, similar relief is granted.

Mattison v. Schofield, 27 Wis. 671. Rourke v. McLaughlin, 38 Cal. 196.

Upon this demurrer the existence of the trust must be assumed and the entry must be demurrer overruled.

CAREY v. BROWN.

92 U. S. 171. 1875.

Action upon notes held by plaintiffs in trust. The defendants claim that the beneficiaries of the trust should be joined as plaintiffs.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellants were defendants in the court below. Tucker and Hoskins, the other defendants, declined to appeal.

The case was ably argued here by the counsel upon both sides.

It is insisted that the bill is fatally defective for want of parties. It alleges that the complainant was the owner and holder of the ten promissory notes which lie at the foundation of the case. In his testimony, he says he held the legal title to them, and that they were delivered to him by their respective owners with power to settle and dispose of them at his discretion, and with no condition imposed but the implied one that he should account for the proceeds to those from whom he received them.

The transfer created a trust. Those who transferred them were the cestuis que trust, and Brown was the trustee.

The general rule is, that in suits respecting trust-property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties. Story's Eq. Pl., § 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust-property or to reduce it to possession, and in no wise affects his relation with his cestuis que trust, it is unnecessary to make the latter parties. Horsly v. Fawcett, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the

trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested." Such is now the settled rule of equity pleading and practice. * * *

Where the want of parties appears on the face of the bill, the objection may be taken by demurrer. Where it does not so appear, it must be made by plea or answer. Here the defect, if there was one, did not appear in the bill, and no plea or answer setting it up was filed in the Circuit Court. It was first made here. A formal objection of this kind cannot avail the party making it, when made for the first time in this court. * * *

The Beneficiary's Remedies. Following Trust Property.

LOWE v. JONES.

192 Mass. 94, 78 N. E. 402. 1906.

Bill by Stephen C. Lowe against M. B. Jones, administrator. Reported to the Supreme Judicial Court. Bill dismissed.

KNOWLTON, C. J. The defendant's intestate, one Merriam, held stock of the plaintiff under an arrangement which established a relation of trust between the parties, and made it his duty to continue to hold it until the conditions should change. It is averred in the bill that he sold a part of it and received the proceeds as his own, and pledged the remainder of it to the defendant bank as security for a loan made to him personally. On the facts averred there is nothing to show that the bank did not take the pledged property in good faith, under such circumstances as would enable it to hold it as security for the loan. Indeed, this part of the stock, with Merriam's note which it was pledged to secure, has been taken up by the plaintiff under a stipulation that the redemption should be without prejudice to the right of any of the parties. There is no doubt of the plaintiff's right to hold this part of the stock as trust property, except as to the claim of the bank under its loan. Were it not for the bank's claim he could redeem it from the defendant, in accordance with the arrangement under which it was originally held. The present contention as to this stock relates only to that part of its value which is represented by

the loan. As to that part the rights of the parties are substantially the same as they are in regard to the other stock which Merriam sold in violation of his trust.

The plaintiff avers that Merriam's estate has been represented insolvent, and he seeks to establish a trust against the general assets of the intestate in the hands of the administrator, in such a way as to obtain the full value of the stock to the corresponding diminution of the amount to be divided among the creditors. All the stock that was sold and the interest of the bank in that which was pledged have gone into the hands of holders in good faith for a valuable consideration. The plaintiff therefore cannot obtain it in specie. His only right, if he has any beyond that of the general creditors, is to follow the money received on account of it, and establish his trust against that.

The rule stated in some of the early cases that a trust cannot be enforced against money mingled with other money in a common fund, because money has no earmarks, has been relaxed; and it is now held that if the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund. This principle has often been recognized both in England and America. A leading case on this subject is In re Hallett's Estate, 13 Ch. Div. 696. The opinions in this case have sometimes been understood as carrying the law further in the direction of following proceeds to enforce a trust than it was actually carried. As a consequence, there have been decisions in some of the American states to the effect that, if one's general estate has been enriched by the proceeds of trust property, the trust may be established against the general assets, even though the estate is insolvent. See McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; Davenport Plow Company v. Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; Myers v. Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; Carley v. Graves, 85 Mich. 487, 48 N. W. 710, 24 Am. St. Rep. 99. But these cases have all been either expressly overruled or greatly limited and qualified. Nonotuck Silk Company v. Flanders, 87 Wis. 237, 58 N. W. 383; Burnham v. Barth, 89 Wis. 362, 366, 62 N. W. 96; Bradley v. Chesebrough, 111 Iowa 126, 82 N. W. 472; Fire Commissioners v. Wilkinson, 119 Mich. 658, 670, 78 N. W. 893, 44 L. R. A. 493; Travelers' Insurance Company v. Caldwell, 59

Kan. 156, 52 Pac. 440; Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634. In some states it is held that, while it is not enough to show that trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remain unexpended somewhere in the estate. See Slater v. Oriental Mills, 18 R. I. 353, 27 Atl. 443; Bradley v. Chesebrough, ubi supra; Hopkins v. Burr, 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238; Pearson v. Haydel, 90 Mo. App. 264; Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885. But by the great weight of authority, a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of In re Hallett's Estate, to which we have already referred. In the later case of In re Hallett & Company, (1894) 2 Q. B. 237, 244, it was said in the opinion: "There is nothing in our decision in the present case which is in conflict with the decision In re Hallett's Estate. In order to follow trust money there must be specific property, capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way. It was said that where a trustee pays his own money and also trust money in his banking account, it is the same thing as though he had placed them in a box, and his drawing for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that there must be a specific thing capable of being followed." See, also, In re Stenning, (1895) 2 Ch. 433; In re Oatway, (1903) 2 Ch. 356. The rule in Massachusetts has always been held, with considerable strictness, to require the identification of the trust property as passing into some other specific property or fund, as distinguished from the general assets of one's estate. Howard v. Fay, 138 Mass. 104; Attorney General v. Brigham, 142 Mass. 248, 7 N. E. 851. In Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, this court said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money, but when as matter of fact it cannot be traced, the equitable right of the cestui que trust to follow it fails. * * *

There is nothing to the contrary in National Bank v. Insurance Company, 104 U. S. 54, 66, 71, 26 L. Ed. 693, and In re Hallett, 13 Ch. Div. 696, 708, 721, which are chiefly relied on by the annuitants. In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property to enforce the trust, and that if it can be traced into the estate of the defaulting agent or trustee this is sufficient. McLeod v. Evans, 66 Wis. 401, 409, 28 N. W. 173, 214, 57 Am. Rep. 287. But this seems to us to be stated too broadly." We have already seen that this case in Wisconsin has been overruled.

The great weight of authority both in England and America is in accordance with the rule in Little v. Chadwick, above stated. Bank's Assigned Estate, 166 Pa. 622, 31 Atl. 334; Fire Commissioners v. Wilkinson, 119 Mich. 670, 78 N. W. 893, 44 L. R. A. 493; Hauk v. Van Ingen, 196 Ill. 20, 39, 63 N. E. 705; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Ober & Sons' Company v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; In re Mulligan, (D. C.) 116 Fed. 715, 717, 718; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Northern Dakota Elevator Company v. Clark, 3 N. D. 26, 30, 53 N. W. 175; Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50; Rockwood v. School District, 70 N. H. 388, 47 Atl. 704; Peters v. Bain, 133 U. S. 670, 678, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; Frelinghuysen v. Nugent, (C. C.) 36 Fed. 229, 239; Holmes v. Gilman, 138 N. Y. 369, 376, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; Matter of Hicks, 170 N. Y. 195, 198, 63 N. E. 276, and English cases above cited.

All that is averred in the present case is that the proceeds "were received by said Merriam, and form a part of the assets of his estate now in the hands of said respondent Jones." This is equivalent to a statement that the proceeds in the form of money came into the hands of Merriam, and cannot be traced further, although the plaintiff avers that they were not paid out, but went to increase the assets of the estate.

Where money is received and mingled with one's general property by the holder, and used as his own, there would be great difficulty, in most cases, in showing that none of it was expended or used to pay debts, if it were held for any considerable time. Moreover, if it is impossible to trace the money into any fund or investment, and it becomes part of the general

assets of the holder, which assets perhaps have changed their form in a variety of ways after the receipt of the money, it would be impossible to enforce a trust, unless it were established against every variety of property belonging to the holder, including debts, choses in action, and other things which it is not easy to make the subject of a trust. In the settlement of an insolvent estate there would be little equity in preferring this kind of claim, as against other creditors some of whose claims might be quite as meritorious, and founded on as great a violation of private rights as that of the cestui que trust. Except in cases of the insolvency of the trustee, the right to establish a trust against his estate is of no consequence, for all that could be obtained in such a case would be the value of the trust property, or its proceeds, and that can always be collected of the trustee if he is solvent. For different reasons we think the rule stated in Little v. Chadwick, ubi supra, should be followed, and that a trust should not be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property went into the general assets, and thereby increased the amount in the hands of the administrator.

The contention of the plaintiff, that the administrator should be compelled to use the general assets of the estate to exonerate the stock in the possession of the bank from its liability for the bank's debt, is simply another way of urging that the general assets of the intestate are impressed with a trust, to the amount of the loan received by the intestate. Unless they are so impressed they cannot be taken from the general creditors and used for the redemption of the trust property in the hands of the bank. The case of Ex Parte Allston, L. R. 4 Ch. App. 168, has no application to this contention. That was a case of marshaling assets which had been pledged for a debt of the bankrupt. The pledge included trust property and other property of the bankrupt. It was decided that the other property held in pledge must all be applied to the payment of the debt, to the exoneration of the trust property. In the present case the only property pledged was trust property, and there is no opportunity to marshal assets in the payment of the debt from the proceeds of the pledged property.

Bill dismissed, without prejudice to the right of the plaintiff to prove his claim against the estate.

CAVIN v. GLEASON.

105 N. Y. 256, 11 N. E. 504. 1887.

ANDREWS, J. It may properly be conceded that the $3,000, received by White from the petitioners on the third day of January, 1883, for investment in the Gould mortgage, constituted in his hands a quasi trust fund, which White was bound to use for the specific purpose contemplated, and which he could not divert to any other use without committing a breach of trust. The securities which formed the greater part of the fund were immediately convertible into money, and authority in White to make such conversion was implied, but only as a means of realizing the money with which to make the mortgage loan. The securities, while in the hands of White, remained the property of the petitioners; and, when converted by him, their title attached to the proceeds of the converted property. White collected the securities actually or constructively. He collected the notes against third persons, and drew the money deposited in the Delaware National Bank. The two certificates of deposit issued by himself, amounting in the aggregate to $780, he accepted as money.

It is material to a proper understanding of the question presented, to state a few other facts which appear in the record. White was a private banker. On the fifth of January, 1883, two days after the transaction with the petitioners to which we have alluded, he was taken sick, and on or about the ninth of January a run commenced on the bank, and on the twelfth of January he made a general assignment to the defendant, Gleason, for the benefit of creditors, having at the time on hand in cash assets only the sum of $64.75. The Gould mortgage was never procured by White, and he made no investment for the petitioners of the $3,000 received on the third day of January. On the contrary, it was found by the judge at special term that White, after receiving and collecting the securities, and prior to the eleventh day of January, in violation of his trust, used the entire fund of $3,000, excepting the sum of $30, which came to the hands of the assignee, in paying his personal debts and liabilities. But on the eleventh of January, the day prior to the making of the assignment, for the purpose

of securing the claim of the petitioners, he transferred to them a land contract, from which and other sources the petitioners have realized sufficient to reduce their claim to the sum of $877.27. It was admitted on the hearing of the petition, which took place in January, 1885, that the assignee had then on hand proceeds of the assigned estate sufficient to pay the said sum of $877.27, but it was conceded by the petitioners that the assigned estate was insufficient to pay in full the debts of the assignor.

The special term has granted the prayer of the petitioner, and made an order directing the assignee to pay the claim of the petitioners out of the money in his hands, and this order was affirmed by the general term. The order in effect appropriates out of the assigned estate the sum of $877.27 to the payment of the claim of the petitioners, in preference to the claims of the general creditors.

The petitioners, to maintain the order in question, rely upon the rule in equity that, as between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed, or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 DeGex, M. & G. 387, Turner, L. J. This settled doctrine of equity has its basis in the right of property. The owner of personal property which, by the wrongful act of his agent or trustee, has been changed and converted into chattels of another description, may elect to treat the property into which the conversion has been made as his own. Upon such election the title to the substituted property is vested in him as fully as if he had originally authorized the wrongful act, which title he may assert in a legal action to the same extent as he could have asserted title in respect to the original property. The reason of the doctrine is stated by Lord Ellenborough in the leading case of Taylor v. Plumer, 3 Maule & S. 562, in language often quoted: "For," he says, "the product or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." The question in that case involved the legal title

to certain stock and bullion which an agent of the defendant, intrusted by his principal with money to invest in exchequer bills, had wrongfully misapplied to the purchase of the stock and bullion, intending to abscond with it and go to America, and the court sustained the defendant's title.

The courts go very far to protect the rights of property against a wrong-doer. They follow it through whatever changes and transmutations it may undergo in his hands, and as against the wrong-doer, transfer to the changed and altered product the original title, however much the original property has been increased in value by his labor or expenditure, provided only that the product is still a chattel, and is composed of the original materials. Silsbury v. McCoon, 3 N. Y. 379. But a court of law, as a general rule, can deal only with the legal title; and when the legal identity of the property is destroyed, or the property cannot be traced specifically into another thing, it is powerless to give relief, except by action for damages against the wrong-doer. This is implied in the language of Lord Ellenborough, already quoted; and that language is followed by an illustration of his statement that the right to follow property only ceases when the means of ascertainment fail, "which," he remarks, "is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description."

It is not important to inquire whether later decisions have not established, even in respect to strictly legal actions, a somewhat less stringent limitation upon the right of pursuit than that indicated in the language just quoted. But it is unnecessary to pursue this inquiry here. It is clear that in this case the trust fund has been dissipated and lost by the act of the trustee. It is neither specifically in the hands of the trustee or of his assignee, nor is it represented by other property into which it has been converted. The fund, according to the finding, (with the exception of the sum of $30,) was paid out on the debts of White before the assignment. Plainly, there is no room for any contention that the petitioners have legal title to any of the assigned property. The sole inquiry is whether a case is made for equitable intervention in favor of the petitioners in the administration of the insolvent estate. It is clear, we think, that, upon an accounting in bankruptcy or insolvency, a trust creditor

is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court doubtless may order it to be restored to the trust. So, also, if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed, should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust-estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property.

But it is the general rule, as well in a court of equity as in a court of law, that, in order to follow trust funds, and subject them to the operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust-estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded. * * *

The facts in this case fall short of the proof required within any case which has come to our notice. The trust fund, with the single exception mentioned, was misappropriated by White to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts. The courts below seem to have proceeded upon a supposed equity springing from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved pro tanto from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited. We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be supposed to have contributed to the assets which constitute the residuum of his estate.

The case of People v. City Bank of Rochester, 96 N. Y. 32, seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general fund of the bank, or that they had not passed in some form to the receiver. The court did not decide, nor intend to decide, that the petitioners would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver.

For the reasons stated, we are of opinion that the orders of the special and general terms should be modified by reducing the sum directed to be paid by the assignee to the sum of $30, with interest from April 19, 1883, but without costs to either party.

LEADING ILLUSTRATIVE CASES
LAW OF QUASI-CONTRACTS

CHAPTER II.

RECOVERY FOR BENEFITS TORTIOUSLY OBTAINED BY DEFENDANT—WAIVER OF TORT.

Necessity of Benefit to Defendant.

MINOR v. BALDRIDGE.

123 Cal. 187, 55 Pac. 783. 1898.

Assumpsit by Isaac Minor against Cyrus Baldridge and the California, Oregon & Idaho Railway Company. From a judgment in favor of plaintiff, defendants appeal. Reversed as to William Baldridge and affirmed as to the railroad company.

TEMPLE, J. This action is for money had and received. The only facts alleged in the complaint are that on the 2d day of November, 1895, defendants were indebted to plaintiff in the sum of $1,000 for money had and received by them for the use of plaintiff, no part of which has been paid. The defendants did not demur, and their answer consists only of a general denial. At the trial the plaintiff introduced evidence which tended to prove that plaintiff and the corporation defendant entered into an agreement, in writing, by the terms of which plaintiff agreed to pay to the corporation $20,000 in six installments, all dependent, as to the time of payment, upon the progress of the work in the construction of a railroad which the corporation was proposing to build. The first installment was to be paid as follows: "Five per cent. of said amount on call and after the terminal is secured on Humboldt Bay." The written contract was signed only by the plaintiff, but there was an indorsement upon it as follows: "This is secured on condition that the California, Oregon and Idaho Railway Company build up Mad river, and

take material at market price for use of construction in said railroad for all we can use. California, Oregon and Idaho Railway Co.—Cyrus Baldridge." All this evidence was received subject to the objection on the part of defendants that it was not relevant to any issue made in the proceedings. Plaintiff owned a sawmill near Mad river, and the agreement on the part of the corporation was understood to mean that the corporation would buy lumber from plaintiff, and this, he contends, was the consideration for his contract. Some time after the contract had been signed, Baldridge, acting for the corporation, represented to plaintiff that a terminal had been secured on Humboldt Bay, and therefore the first installment was due. Baldridge also promised plaintiff that if he would make the payment the corporation would at once order from him a large amount of lumber. Believing these representations, and trusting in the promise, plaintiff paid to the Randall Banking Company at Eureka the sum of $1,000 as and for the first installment due upon the contract. Evidence was introduced which tends to prove, and the jury found, that no terminal had been procured on Humboldt Bay, and the corporation has never purchased or offered to purchase lumber from plaintiff. The court charged the jury that, if Baldridge falsely represented that a suitable terminal had been secured on Humboldt Bay, and falsely promised that, if he paid the first installment, an order for a large amount of lumber would be immediately made, they must find for plaintiff. At the close of plaintiff's evidence defendants, and each of them, moved for a nonsuit. The motion was denied, and the refusal was duly excepted to, and the ruling is assigned as error on the appeal.

As to Baldridge, I think the motion should have been granted. There was no evidence which even tended to prove that Baldridge ever received the money, or any portion thereof. The bank was the agent of the corporation, and it was stipulated in the written agreement that the money was to be paid to the bank for it. If the action were for damages, the rule would be different, as both principal and agent are responsible for a tort committed by an agent within his authority, and adopted by the principal. But the basis of this action is that the defendant has money which, in equity and good conscience, it ought to pay to plaintiff. There was no evidence showing or tending to show,

that Baldridge had any money which he ought to pay to plaintiff. On behalf of the corporate defendant it is contended that the evidence, all of which was received over the objections of the defendants, was inadmissible under the complaint.

(1) No evidence could be received under such complaint, because, as required in the code system of pleading, it does not state a cause of action. It does not state the real facts which constitute the cause of action, but only certain conclusions of law which might result from various actual conditions. Implications of law from various circumstances which are not stated do not constitute the facts which, under our system, must be pleaded.

(2) Admitting that the common counts can be used in code pleading, yet where the reliance, as here, is upon proof of fraudulent representations, the facts constituting the fraud should be set out with some particularity; and where that is not done no proof of fraud can be received; and,

(3) This action is based upon an alleged breach of an express contract, and the question is whether, by the terms of the contract, the money was due when it was paid. It is contended that under such circumstances a complaint in the form of a common count for money had and received cannot be maintained.

1. That the common counts in assumpsit may be used in this state is too well established to be now called in question. The matter was discussed in Abadie v. Carrillo, 32 Cal. 172. Two justices expressed the opinion that the use of the common counts was inconsistent with the code provisions which require a party in his pleading to state the facts constituting his cause of action, but they were of the opinion that the practice was too well established to be then held improper. In several cases since then the use of the common counts has been upheld. In Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127, a discussion is had as to the circumstances which will justify its use for the recovery of money due upon express contracts; and section 1042, Greenl. Ev., is cited, as applicable to our system. In Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998, it is said that the common count is good against a general demurrer. In Shade v. Lumber Co., 115 Cal. 357, 47 Pac. 135, the same ruling is made, but it seems to be implied that such a pleading might be held insufficient as against a special demurrer that the pleading is ambiguous, uncer-

tain, and unintelligible. There was no demurrer here, and the first point must be overruled.

2. In the absence of a special demurrer, is the common count sufficient to justify the court in receiving evidence, when the objection is made that the facts constituting the alleged fraud are not set out? In answer I think it must be held, under the authorities, that such a pleading is sufficient. At common law the common count for money had and received could be used to recover money obtained by false and fraudulent representations. 1 Chit. Pl. p. 364. In Moses v. Macferlan, 2 Burrow, 1005, Lord Mansfield said: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, ex æquo et bono, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances." The mode of pleading is inconsistent with our Code, and it may be a matter of regret that it was ever tolerated, but the innovation is not so great if such complaint must fall before a special demurrer, which is like a motion to require a pleader to make his pleadings more definite, which practice prevails in some states.

3. The action is not based upon a breach of a contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is that the money was obtained upon a false representation that it had become due under the contract by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event the corporation may yet perform and become entitled to demand and enforce payment from plaintiff. I think the evidence was properly received, and that it was sufficient to sustain the judgment. As to the California, Oregon & Idaho Railway Company, the judgment is affirmed. As to the other defendant, the judgment is reversed.

CHAPTER IV.

RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

Judgment Subsequently Reversed.

CLARK & CLARK v. PINNEY.

6 Cowen 297 (N. Y.). 1826.

(Assumpsit. On the trial it appeared that the defendants had obtained judgment against the plaintiffs; that execution had been issued upon this judgment and subsequently returned by the sheriff as satisfied; that afterwards the judgment was reversed by the supreme court on a writ of error. The lower court non-suited the plaintiffs.)

CURIA, per SAVAGE, C. J. The important question in this case is, whether indebitatus assumpsit for money had and received lies to recover money paid on an execution upon a judgment which was afterward reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, ex æquo et bono, belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is whether this is the proper remedy.

* * * * * * * * *

Upon the whole, my view of the question is this: the general principle is, undoubtedly, in favor of sustaining the action. * * * I am inclined to sustain the action. The inclination of the courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money, though it was taken from him by process erroneous merely. Then, why turn him round from this simple action to

the antiquated remedy by scire facias? I do not think the purposes of justice require it.

* * * * * * * * *

In my opinion there should be a new trial.

New trial granted.

Recovery of Taxes Paid.

PRESTON v. CITY OF BOSTON.

12 Pick. 7 (Mass.).

(Assumpsit to recover $711.50, money had and received to the use of the plaintiff, being the amount of a tax assessed upon him for the year 1828, for his poll and personal estate, and by him paid to the treasurer and collector of the city of Boston.)

* * * * * * * * *

SHAW, C. J., delivered the opinion of the court.

The only remaining question is, whether this money was paid voluntarily or under duress. A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course would put it in the power of the other party to choose his own time and opportunity for commencing a suit. Brisbane v. Dacres, 5 Taunt. 143. But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. Astley v. Reynolds, 2 Str. 916.

What shall constitute such duress, is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. Knibbs v. Hall, 1 Esp. 84. Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. Brown v. McKinally, 1 Esp. 279. But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party,

upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable recover it back as money had and received. Amesbury W. & C. Manuf. Co. v. Amesbury, 17 Mass. 461.

It appears by the facts agreed that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing that he was not liable he may recover it back in this action from the defendants, into whose treasury it has gone.

Defendants defaulted.

CHAPTER V.

RECOVERY FOR BENEFITS CONFERRED WITHOUT REQUEST.

Discharge of Defendant's Legal Obligation.

PATTERSON v. PATTERSON.

59 N. Y. 574. 1875.

(Action to foreclose a mortgage executed by defendant to secure his bond to plaintiff's testator. Defendant set up a counterclaim, one item of which was for the necessary funeral expenses of the deceased which had been paid by defendant to the undertaker. The court below found that these expenses had been paid by the defendant but held that such payment was not a proper subject of counterclaim.)

FOLGER, J. * * * I have no doubt but that the reasonable and necessary expenses of the interment of the dead body of one deceased, are a charge against his estate, though not strictly a debt due from him. The ground of this is the general right of every one to have decent burial after death; which implies the right to have his body carried, decently covered, from the place where it lies to a cemetery or other proper inclosure, and there put under ground. Regina v. Stewart, 12 Ad. & Ell., 773, citing Gilbert v. Buzzard, 2 Hagg. Consist. R. 333; see, also, Chapple v. Coope, 13 M. & W. 252. In the last case, in which an infant, a widow, was held liable on her contract for the funeral expenses of the burial of her deceased husband, it was said, that "there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule to say, that it may be classed as a personal advantage and reasonably necessary to him." This right existing, the law casts upon some one the duty of seeing that it is accorded. 12 Ad. & Ell. supra. So it would seem, at common law, that if a poor person of no estate dies, it is the duty of him under whose roof his body lies, to

carry it, decently covered, to the place of burial. 12 Ad. & Ell., supra. The husband surviving is bound to bury the corpse of his wife; and in his absence, another, a relative, with whom she has lived up to her death, having directed the funeral and paid the expense, may recover it of the husband. Jenkins v. Tucker, 1 H. Bl. 90; 13 M. & W. supra; and see Ambrose v. Kenison, 10 C. B. 776. And where the owner of some estate dies, the duty of the burial is upon the executor. Toller Laws of Exrs., 245, bk. 3, cap. 1, § 1. And our Revised Statutes (2 R. S. 71, § 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. Tugwell v. Heyman, 3 Camp. 298. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. And so, in Rogers v. Price, 3 Younge & Jervis, 28, it was held that an executor, with assets, is liable to a brother of the deceased for the proper expenses of a funeral ordered and paid for by the latter in the absence of the former. In Hapgood v. Houghton's Executor, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. And in Adams v. Butts, 16 Pick. 343, it was held that an account for the funeral expenses of a deceased person might be set off by the defendant in action against him by an administrator for the work and labor of the deceased in his lifetime. Price v. Wilson, 3 N. & M. 512, is sometimes cited as an authority that "there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom credit is given, the executor is liable." Patterson, J., did there use that language. But in Green v. Salmon, 8 Ad. & Ell. 348, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person,

is not liable to the undertaker; if it lays down more, the law stated is extrajudicial." See also Rappelyea v. Russel, 1 Daly, 214, where the subject of the liability of a personal representative is well considered by the learned chief justice of the New York Common Pleas.

To a claim for the payment of such expenses by an executor, the objection does not lie that the rule of distribution of assets will be improperly interfered with if the claim is allowed and paid. Unless there is some objection arising out of statutory provisions, these expenses must be preferred to all other debts (Toller on Exrs., 245), not excepting debts due by record, even to the sovereign. Parker v. Lewis, 2 Devereux [S. C.], 21. Even in the case of an insolvent estate, the executor has been allowed the reasonable expenses of the funeral of his testator, on a plea of *plene administravit*. Edwards v. Edwards, 2 Cr. & M. 612.

No statutory provisions are now in mind which interpose an obstacle. Though our statute of payment of debts and legacies (2 R. S., p. 87, § 27) gives the order in which the executor shall make payment of debts against the estate, and though there is no provision there for a priority of payment of funeral expenses, it is not to be held therefrom that the common-law rule is abrogated. Those expenses are not to be treated as a debt against the estate, but as a charge upon the estate, the same as the necessary expenses of administration. Fitzhugh v. Fitzhugh, 11 Gratt. 300. The expenses of probate of will precede the formal authority to the executor, but are allowed to him on an accounting. So should funeral expenses be. The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take place at all (Rex. v. Stewart, supra), and against a proper public sentiment, that it should not take place with decency. Kanasan's Case, 1 Greenl. 226; see Jones v. Ashburnham, 4 East, 460; Regina v. Fox, 2 Q. B. 246. The Revised Statutes, already cited, impliedly give discretion that the executor, even before probate, shall pay the funeral charges; and notwithstanding the statute setting out the order of payment, if he follow that direction or that authority, the amount will be allowed to him as part of the expenses of his trust, with the restriction always that the amount is no greater than is necessary. And if they are paid by another than the executor, and reimbursed by or collected of the latter, there

must be the same result. It follows that the defendant is entitled to be paid from the assets of the estate in the hands of the plaintiff, the amount which he has incurred and paid for funeral expenses.

The judgment appealed from, must be modified so as to allow to the defendant, in diminution of the amount of the claim established against him, the sum of $184.30. He is also entitled to the interest thereon. There is no day named in the findings or in the testimony on which the sum was paid by the defendant. He alleges in his answer that the claim was assigned to him on the 25th April, 1872, and if interest is reckoned from that date, it will not be unjust to him.

The judgment so modified, should be affirmed, without costs to either party in this court.

All concur, except GROVER, J., dissenting.

Judgment accordingly.

CHAPTER VI.

RECOVERY FOR BENEFITS CONFERRED BY MISTAKE.

Mistakes of Fact and of Law Distinguished.

BILBIE v. LUMLEY.

2 East 469 (Eng.). 1802.

This was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance, in order to recover back £100 which he had paid upon the policy as for a loss by capture to the defendants, the assured. The ground on which the action was endeavored to be sustained was, that the money was paid under a mistake, the defendants not having at the time of insurance effected, disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them, relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but what the defense rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question; and therefore it was contended at the trial before Rooke, J., at York, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprised at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back, was a defense to any action which might have been brought on the policy; and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last term for setting aside the verdict and having a new trial, which was to have been sup-

ported now by Park for the defendants, and opposed by Wood for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment,—

Lord ELLENBOROUGH, C. J., asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued:] The case of Chatfield v. Paxton is the only one I ever heard of, where Lord Kenyon at nisi prius intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In Lowrie v. Bourdieu, 1 Dougl. 467, money paid under a mere mistake of the law was endeavored to be recovered back; and there Buller, J., observed that *ignorantia juris non excusat*, &c.

Rule absolute.

Payor's Assumption of Risk—Compromise.

WHEADON v. OLDS.

20 Wend. 174 (N. Y.). 1838.

This was an action of assumpsit, tried at the Onondaga circuit in March, 1836, before the Hon. Daniel Moseley, one of the circuit judges.

The defendant agreed to sell to the plaintiff from 1600 to 2000 bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after awhile it was agreed between the parties to call the whole quantity 1900 bushels, and the plaintiff accordingly paid

for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded,—the tallies representing half bushels and not bushels, and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received, and delivered a bill of particulars stating the contract between the parties, that the oats were delivered, and "that in measuring said oats a mistake was made, whereby the plaintiff paid the defendant for about 300 bushels more oats than he received." The defendant proved by one witness that the plaintiff said that he would take the oats at 1900 bushels hit or miss, and by another that he had acknowledged that he took the oats at that quantity at his own risk. He further proved that before the boat left the storehouse, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, that he told them that if they were dissatisfied with the quantity, to put the oats back in the storehouse, and pay him for his trouble. When the evidence was closed the counsel for the defendant stated that he should not question the fact that the parties were mutually in error in supposing that 500 bushels of oats had been put on board, when in fact only 250 bushels had been put on board at the time of the bargain in reference to the quantity, but insisted that the bargain was obligatory upon the plaintiff, and that therefore he was not entitled to recover. He also insisted that the proof varied from the bill of particulars; and thirdly, that at all events the plaintiff was only entitled to recover for the deficiency of 250 bushels in the first estimated quantity. The judge charged the jury that if they should find that the parties at the time of the bargain in reference to the 1900 bushels were in error as to the quantity measured, and supposed that 500 bushels had been measured when in fact the quantity measured was only 250 bushels, and had based the

bargain upon that supposition, then that the plaintiff was entitled to recover for the deficiency of the 1900 bushels. The jury found a verdict for the plaintiff for $190. The defendant moves for a new trial.

COWEN, J. The objection of variance from the bill of particulars was too general. It should have been stated whether it was in quantity, or sum, or in what else.

The mistake as proved went not only to the quantity measured, but the jury found under the charge of the judge, that relatively it influenced the entire agreement to take the oats at 1900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on the finding of the jury, to the full amount which the oats came short of 1900 bushels. All the excess of payment arose from a count of half bushels as bushels. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him. The mistake which entitles to this action is thus stated by the late Chief Justice Savage from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Mowatt v. Wright, 1 Wend. 360. He cites the words of 2 Ev. Poth. 437. And see 1 Dom. 248, B. 1, tit. 18, § 1, pl. 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11. And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is to take at the party's own risk, or, as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, pro tanto, annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1900 bushels. The effect would have been different had the truth been known to

the plaintiff. See Domat, as before cited. The foundation of the arrangement to take at the plaintiff's risk was a misreckoning, one number being put instead of another, "which," says Domat (pl. 12), "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial was denied.

Mistake as to Collateral Fact.

AIKEN v. SHORT.

1 Hurlstone & Norman 210 (Eng.). 1856.

Action for money had and received. Plea, never indebted.

At the trial before Platt, B., at the Middlesex sittings, in last Hilary term, the following facts were proved: The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February, 1846, by which he gave his property equally amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the banking company his one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of £200, which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter, and Charles Carter, dated October, 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the bank, that the bank should pay off this sum of £200 and interest. In May, 1855, the bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the bank for payment of the £200, and interest, stating that he had applied to George Carter, who had referred him to the bank. The bank accordingly, through their attorney, paid to the defendant the sum of £226 16s. 6d. The bond and instru-

ment of mortgage were handed over by the defendant to the bank, and they took a receipt for the money due on the bond and mortgage. In August, 1855, John Carter produced a will of Edwin Carter, dated April, 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of £100, which ceased upon his making any assignment. The bank then applied to the defendant to refund the £226 16s. 6d. previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

POLLOCK, C. B. We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter,—a bond and a security on property which Carter afterwards mortgaged to the bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. In consequence of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received installments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the bank, as the agents of Carter.

PLATT, B. I am of the same opinion. The action for money had and received lies only for money which the defendant ought

to refund ex æquo et bono. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the bank. Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it.

BRAMWELL, B. My brother Martin, before he left the court, desired me to say that he was of the same opinion, and so am I. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. See Wilson v. Thornbury, L. R. 10 Ch. 239. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the bank thought they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In Pritchard v. Hitchcock, 6 M. & G. 151, a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of the opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

CHAPTER VII.

RECOVERY FOR BENEFITS CONFERRED UNDER CONTRACTUAL AGREEMENT.

Contract Void for Illegality.

WHITE v. THE FRANKLIN BANK.

22 Pick. 181 (Mass.).

WILDE, J., delivered the opinion of the Court. The first ground of the defense is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise, this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Stat. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate or contract, in any form whatever, for the payment of money, at any future day certain, or with interest excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This therefore was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well settled principle of law. It was fully discussed and considered in the case of Wheeler v. Russell, 17 Mass. R. 281; and the late Chief Justice, in delivering the opinion of the Court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same

principle is laid down in Springfield Bank v. Merrick, 14 Mass. R. 322, and in Russell v. De Grand, 15 Mass. R. 39. In Belding v. Pitkin, 2 Caines' R. 149, Thompson, J., said, "it is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In Shiffner v. Gordon, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that where a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being participes criminis, no action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in Howson v. Hancock, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely malum prohibitum, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are in pari delicto, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void

and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law, that the plaintiff should recover." 2 Com. on Contr. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being particeps criminis with the defendants, they are not in pari delicto. It is not universally true, that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not in pari delicto, the rule potior est conditio defendentis, is not applicable. In Lacaussade v. White, 7 T. R. 535, the court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties, or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of Smith v. Bromley, 2 Dougl. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal

against such general laws, the rule is potior est conditio defendentis. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of Jones v. Barkley, 2 Dougl. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office-keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. Jaques v. Golightly, 2 W. Bl. 1073. But in Browning v. Morris, Cowper, 790, it was decided, that where a lottery-office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office-keeper might be. The distinction, on which this case was decided, is very material in the present case. Lord Mansfield referred to the determination in Jaques v. Golightly, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And he adds, "it is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So in usury, there is no penalty noticed and enforced by Lord Ellenborough, in Williams v. Hedley, 8 East, 378. In that case it was decided, that where money was paid to a plaintiff to compromise a qui tam action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, &c." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so

far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly in pari delicto with the plaintiff in the qui tam action, he was at any rate particeps criminis, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in Smith v. Bromley, and the decisions in the several cases in which that doctrine has been confirmed. The same distinction has been recognized in other cases, and was adopted by this Court in Worcester v. Eaton, 11 Mass. R. 376, in which Parker, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide, that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground, on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay, was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in Walker v. Chapman, Lofft, 342, where money had been paid, in order to procure a place in the customs,

but the place had not been procured; and in an action brought by the party who paid the money, it was held, that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in Lowry v. Bourdieu, 2 Dougl. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were in pari delicto. The case of Tappenden v. Randall, 2 Bos. & Pul. 467, was decided on that distinction. Heath, J., said, "it seems to me, that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 2 Taunt. 277; 4 Taunt. 290.

In the case of Aubert v. Walsh, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In Utica Ins. Co. v. Kip, 8 Cowen, 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel, that the contract in question was executory, within the true intent and meaning of these decisions, and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the Court being clearly of opinion, that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should

not be supposed to be doubtful in our opinion; which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold, that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In Clark v. Moody, 17 Mass. R. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.

Judgment on default.

Contracts Unenforcible on Account of the Statute of Frauds—Defendant in Default.

DIX v. MARCY.

116 Mass. 416. 1875.

Contract to recover $1800, the price of certain real estate conveyed by the plaintiff to the defendant. The answer admitted the conveyance, but averred that it was made voluntarily and without any agreement for payment on the defendant's part. Trial in the Superior Court before Dewey, J., who, after verdict for the plaintiff, reported the case to this court. The facts appear in the opinion.

ENDICOTT, J. The plaintiff conveyed his farm in August, 1872, to the defendant, his son-in-law, upon an oral agreement, that the defendant would furnish him, his wife and daughter,

with a comfortable support during their lives. The defendant also agreed to give the plaintiff a mortgage on the farm or a life lease thereof to secure the support. Under this agreement the plaintiff with his wife and daughter lived with the defendant on the farm until January, 1874. A difficulty then arose. The defendant ordered the plaintiff to leave, and refused to give him a mortgage according to the agreement. Since then the defendant has furnished no support to the plaintiff, though his wife and daughter have remained with the defendant.

The defendant denied that he made such an agreement. But the jury found that in consideration of the conveyance he agreed to give the plaintiff a mortgage or life lease to secure the support of himself and family.

By ordering the plaintiff to leave the farm and refusing to give the mortgage, the defendant rescinded his oral agreement. This agreement, being within the prohibition of the Statute of Frauds, the plaintiff could not enforce it, but brings this action to recover the value of the property conveyed. It is well settled that he may do so. Where a person pays money, renders service, or conveys property under an agreement, within the Statute of Frauds, and which the other party refuses to perform, an action will lie by such person against the party so refusing to recover the money paid, or the value of the services rendered, or property conveyed. * * *

A person who has received a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received; and there is an implied assumption on which the action against him can be maintained. In such an action the plaintiff is entitled to recover what is due him, or the balance that is due him arising out of the transaction between the parties. If the suit is to recover the value of land conveyed, and there has been part performance by the party refusing to complete it, that is to be considered in determining what is due. If payments have been made, they must be deducted from the amount to be recovered for the value of the land. And if the land was not to be paid for by money, but by furnishing support and maintenance, and there has been a partial performance in that respect, the value of such partial performance to the plaintiff must be allowed by him. He is only entitled to receive from the defendant the value of the property conveyed to him.

In this case the value of the support furnished to the plaintiff by the defendant under the oral agreement, and before its rescission, was properly deducted from the value of the farm, and the plaintiff was entitled to recover the value so found. Day v. N. Y. Cent. R. Co., 51 N. Y. 583; Richards v. Allen, 17 Me. 296; Moses v. Macferlan, 2 Burr. 1005.

Judgment on the verdict.

Same Subject—Plaintiff in Default.

COLLIER v. COATES.

17 Barbour 471 (N. Y.). 1854.

This was an appeal from a judgment of the Steuben County Court. The action was commenced before a justice of the peace, to recover back the sum of $65 which had been paid by the plaintiff upon a parol contract for the sale of a farm by the defendant to the plaintiff. The complaint was for money lent, and money paid. The defendant denied the allegations in the complaint, and stated that if he had received any money from the plaintiff it was upon the condition that the defendant would enter into a written agreement with the plaintiff, at a future day, which the defendant alleged he was, and at all times had been ready to do, and he further averred that he had suffered great damage and expense by reason of the plaintiff not performing his agreement. A parol agreement between the parties, for the sale of the defendant's farm to the plaintiff, was proved, and the price was agreed upon. The plaintiff paid to the defendant $65 upon the contract, and was to pay, within a week or ten days, enough more to make $200; and then a written contract was to be executed by the parties. Subsequently the plaintiff came back and told the defendant he could not make out the $200, and therefore could not take the farm, and he sent word to the defendant, by his son, that he, the defendant, might have the $65 the plaintiff had paid him for his damages, or he might pay back some part of it if he could afford to. The jury found a verdict in favor of the plaintiff for $65, and the justice rendered judgment for that sum, with costs. On appeal the County Court affirmed the judgment.

JOHNSON, J. I regard the rule as well settled, in this country, at least, that where a person has paid money upon a parol contract for the purchase of lands, which is void by the Statute of Frauds, he cannot maintain an action to recover back the money so paid, so long as the other party to whom the money has been paid is willing to perform on his part.

The doctrine has been twice distinctly declared in our own court, where the question was directly before it. Abbott v. Draper, 4 Denio, 51; Dowdle v. Camp, 12 Johns. 451. The same question has been decided in the same way repeatedly in several of the courts of our sister States, where the point was directly involved. Coughlin v. Knowles, 7 Met. 57; Thompson v. Gould, 20 Pick. 132, 142; Duncan v. Baird, 8 Dana, 101; Lane v. Shackford, 5 N. H. 133; Shaw v. Shaw, 6 Vt. 75; Richards v. Allen, 5 Shep. 296; Sims v. Hutchins, 8 S. & M. 328; Beaman v. Buck, 9 S. & M. 257; McGowen v. West, 7 Miss. 569; Rhodes' Adm'r v. Stow, 7 Alab. Rep. 346; Dougherty v. Goggin, 1 J. J. Marsh. 374; 2 J. J. Marsh. 563. In several of the cases above cited, the facts are almost identical with those of the case at bar. All the cases agree that if the party receiving the money refuses to perform the agreement, such as it is, on his part, the action lies.

I doubt whether any well-considered case can be found in the courts of this country, where the rule above laid down has been denied or even doubted. Rice v. Peet, 15 Johns. 503, is cited as holding a contrary doctrine, but it does not. That case turned upon the insanity of the plaintiff at the time of making the trade and turning out the note, which fact the court considered as established by the verdict of the jury. The court do indeed say that the plaintiff might have recovered upon the ground that the contract for the exchange of farms, on which the money was received, being by parol, was void. But the decision was evidently not placed upon that ground. And besides, although the defendant in that case alleged in his plea that the plaintiff had failed in performing his agreement, no evidence seems to have been given upon the subject, and there is nothing in the case to show who was, in fact, in fault in not carrying out the agreement to exchange farms. The decision upon the point presented by the finding of the jury does not impugn the principle contended for, and at most can only be regarded as a dictum the other way. But it is contended by the learned and ingenious

counsel for the plaintiff that neither Dowdle v. Camp nor Abbott v. Draper are authorities against the plaintiff's right to recover, because in each of those cases the plaintiff was in possession of the premises purchased, and might have enforced a specific performance of the agreement in a court of equity. In that respect, it is true, the two cases above cited differ from the case here, although several of the other cases cited do not. But I am unable to perceive how that circumstance affects the principle upon which the plaintiff claims the right to recover. The foundation of his claim is that the money was paid without consideration. That is, that having been paid upon a promise made by the defendant which the law would not compel him to perform, nor mulct him in damages for refusing to perform, and which was, in short, void by statute, it was paid without any consideration whatever which the law notices or regards. But this condition of the parties is not in the least altered by the purchaser's going into possession, so far as the validity and force of the agreement is concerned. It is still void by the Statute of Frauds, notwithstanding the possession. Nothing is better settled than this, that part performance of a parol contract void by statute does not take it out of the statute, or give it any validity in law as a contract.

To whatever extent either or both of the parties may have gone in the performance of such a contract, it still remains of no legal or binding force in law, in every stage up to its full and final performance and execution by both. If it is conceded that possession by the plaintiff, in addition to the payment, would have operated to defeat the recovery of the money paid, the whole ground of controversy is surrendered. It could make no difference as regards the right of action, so far as the question of consideration is concerned, whether the defendant had in fact performed in part or whether he was willing and offered to perform. Besides, when the other party is willing and offers to perform, the question as to whether the plaintiff could compel him to do so in case of his refusal, does not arise. It is clear enough that in case of a refusal the action lies, and the refusal is the ground upon which the action for the recovery is based. Certainly a willingness or an offer to perform must be regarded as placing the defendant in as favorable a situation as part performance, as regards the action at law.

Courts of equity, in decreeing the specific performance of such contracts, do not proceed upon the ground that the contract has any force or validity in law, but only that it is binding in conscience, and its performance specifically is decreed, expressly to prevent fraud, and for the very reason that in law it is of no force. What courts of equity might do, or refuse to do, can have no bearing upon the legal effect of such a contract. The last act or payment by either party, or both, short of full performance, is as much without consideration in law as the first. If the rules of equity are to be permitted to affect the legal right of recovery, the defendant may safely invoke them in his behalf in the present case. But they are not; and in determining the question here, in the action at law, they may as well be laid entirely out of view. It is by no means a universal rule that money paid, without a consideration good in law, may be recovered back. There are several exceptions to it. And I take this to be one which is well established by numerous adjudications.

The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had a right to make and carry out. There was no fraud or mistake of facts. The money was voluntarily paid by the plaintiff, upon a promise made by the defendant, which the former knew at the time he could not oblige the latter to perform, but which promise, nevertheless, he agreed to accept as a sufficient consideration for the money parted with. The money was not received by the defendant as a loan, but as a payment. It was not received to the plaintiff's use. And as long as the defendant is willing to do what he agreed to do, in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement, until the defendant refuses to carry it out. Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect

liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser. And it is asked if it is right to give one party such an advantage over the other? It would be easy to suggest cases of hardship on the other side, if the right to recover in any case were to be controlled by any such considerations. Take the case at bar, for an example. The evidence shows that when the plaintiff entered into the arrangement with the defendant and made the payment, the latter was engaged in putting in a crop of wheat; that the plaintiff requested the defendant to suspend operations, as he would want to put the land to some other use, and that the defendant did suspend, and waited, expecting the plaintiff to fulfil his engagement, until it was too late to put in his crop; in consequence of which he was injured to the amount of over $100.

But suppose the whole purchase price had been paid, and the defendant, in the confident expectation of the plaintiff's acceptance of the title, had gone and purchased another farm with the money, and involved himself in liabilities. which would be utterly ruinous should the other party be allowed to repudiate and recover back the money. It may be asked, would it be right to allow him to do so? It is sufficiently obvious, however, that neither the plaintiff's right to recover back the money, nor the defendant's right to retain it, can rest in, or derive any aid from, such considerations as these. The principle which governs is more fixed and stable.

It is clear that, by the rule of equity, the plaintiff could not recover until he had first made the defendant whole for the damage he had occasioned by the breach of his engagement, or offered to do so. And the law will not, I think, aid the party thus in the wrong, by presuming a promise of repayment, in his favor, until the other party shall refuse to go on and carry out the agreement upon which the money was paid.

The rule which I suppose to be established seems to me to be one founded in reason and good sense, which ought to be upheld. And I regard it as being too well settled upon authority to be departed from, except upon the most cogent reasons, and from the clearest convictions of its unsoundness. I am of opinion, therefore, that the judgment of the County Court and that of the justice should be reversed.

Contract Unenforcible on Account of Impossibility—Plaintiff's Performance Impossible—Defendant's Performance Impossible.

BUTTERFIELD v. BYRON.

153 Mass. 517, 27 N. E. 667. 1891.

Report from Superior Court, Hampden County; James M. Barker, J.

Action by Alonzo M. Butterfield, for the benefit of the London & Lancashire Insurance Company and the Commercial Union Assurance Company, against Napoleon L. Byron, for damages for the breach of a contract for the erection of a building by defendant for plaintiff on the lands of the latter. The contract provided that the building should be completed on a certain day; that plaintiff should pay defendant a certain amount therefor, 75 per cent. of the amount of work done and materials furnished during the preceding month to be paid for on the 1st of each following month, and the remaining 25 per cent. to be paid after the entire completion of the building. Certain amounts were paid defendant, and when the building was nearly completed it was destroyed by fire. The insurance companies paid plaintiff the amount of his loss, and took an assignment of all sums then due and becoming due to him from defendant by reason of his breach of the contract. After the fire, defendant took away from the premises certain building material of the value of $38, belonging to plaintiff.

KNOWLTON, J. It is well established law that where one contracts to furnish labor and materials, and construct a chattel, or build a house, on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. Adams v. Nichols, 19 Pick. 275; Wells v. Calnan, 107 Mass. 514; Dermott v. Jones, 2 Wall. 1; School Dist. v. Bennett, 27 N. J. Law, 513; Tompkins v. Dudley, 25 N. Y. 272. It is equally well settled that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied

condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. Taylor v. Caldwell, 3 Best & S. 826; Lord v. Wheeler, 1 Gray, 282; Manufacturing Co. v. Butler, 146 Mass. 82, 15 N. E. Rep. 76; Bank v. Beal, 141 Mass. 566, 6 N. E. Rep. 742, and cases there cited; Dexter v. Morton, 47 N. Y. 62; Walker v. Tucker, 70 Ill. 527. In such cases, from the very nature of the agreements as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged repeatedly to begin anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's

land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. Howell v. Coupland, 1 Q. B. Div. 258. It seems very clear that after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered: "I do not desire to build another house, which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligations." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and, if that was destroyed by inevitable accident just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract, after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract; for he has not performed his contract so that its stipulations can be availed of. The case of Cook v. McCabe, 53 Wis. 250, 10 N. W. Rep. 507, was very similar in its facts to the one at bar, and

identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a pro rata share of the contract price for the work performed and the materials furnished before the fire. Clark v. Franklin, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute, upon the authorities. The decisions in England differ from those of Massachusetts and of most of the other States of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. Allison v. Insurance Co., L. R. I. App. Cas. 209, 226; Byrne v. Schiller, L. R. 6 Exch. 319. In the United States and in continental Europe the rule is different. Griggs v. Austin, 3 Pick. 20, 22; Brown v. Harris, 2 Gray, 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and, on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. Appleby v. Myers, L. R. 2 C. P. 652; Navigation Co. v. Rennie, L. R. 10 C. P. 271. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. Whincup v. Hughes, L. R. 6 C. P. 78. But where one dies, and leaves unperformed a contract which is entire, his administrator may recover any installments which were due on it before his death. Stubbs v. Railway Co., L. R. 2 Exch. 311. In this country, where one is to make repairs on the house of another under a special contract, or is to furnish a part of the work and materials used in the

erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In Cleary v. Sohier, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for 40 cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building, and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See, also, Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514, 517. In Cook v. McCabe, ubi supra, the plaintiff recovered pro rata under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In Hollis v. Chapman, 36 Tex. 1, and in Clark v. Franklin, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are Schwartz v. Saunders, 48 Ill. 18; Rawson v. Clark, 70 Ill. 656; and Clark v. Busse, 82 Ill. 515. The same principle is applied to different facts in Jones v. Judd, 4 N. Y. 411, and in Hargrave v. Conroy, 19 N. J. Eq. 281. If the owner, in such a case, has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire

consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements towards a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy is by a declaration in set-off. If, on the other hand, each installment due was a separate consideration for the payment made at the time, then, as to those installments and the payments of them, the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid. We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The $38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought, under an assignment for the benefit of the insurers, to recover damage for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins. According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the Superior Court may deem reasonable.

Verdict set aside.

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